

3-16-2012

Magleby v. Garn Clerk's Record v. 1 Dckt. 39264

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Magleby v. Garn Clerk's Record v. 1 Dckt. 39264" (2012). *Idaho Supreme Court Records & Briefs*. 3806.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3806

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

Christopher J Magleby
Plaintiff(s)/Appellant(s),

Supreme Court No: 39264-2011

Case No: CV-2008-0000469

VS

CLERK'S RECORD ON APPEAL

Kevin Garn
Defendant(s)/Respondent(s).

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,
in and for
THE
COUNTY OF FREMONT

Darren B. Simpson
DISTRICT JUDGE

Attorney
For Appellant

David A Johnson
PO Box 52251
Idaho Falls, ID 83405

Attorney
For Respondent

Kent W. Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Dale Thompson
520 First American Circle
Rexburg, ID 83440



Abbie Mace

Abbie Mace

Clerk of the District Court

Becky Harrigfeld

Becky Harrigfeld
Deputy Clerk

Date: 3/12/2012

Seventh Judicial District Court - Fremont County

User: HARRIGFELD

Time: 09:54 AM

ROA Report

Page 1 of 9

Case: CV-2008-0000469 Current Judge: Darren B. Simpson

Christopher J Magleby, etal. vs. Kevin Garn, etal.

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
9/12/2008	NCOC	MACE	New Case Filed - Other Claims
		MACE	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: David Johnson Receipt number: 0055488 Dated: 9/12/2008 Amount: \$88.00 (Check) For: Magleby, Christopher J (plaintiff)
	NOAP	MACE	Plaintiff: Magleby, Christopher J Notice Of Appearance David A Johnson
	SMIS	MACE	Summons Issued
	SMIS	MACE	Summons Issued
	SMIS	MACE	Summons Issued
9/24/2008	AFFD	MACE	Affidavit Of Service
9/30/2008	AFFD	MACE	Affidavit In Support OF Motion For Service Outside The State
	MOTN	MACE	Motion
	ORDR	MACE	Order For Service Outside The State
10/22/2008	SMRT	MACE	Summons Returned-Served 10-12-08
10/31/2008		MACE	Filing: I7 - All Other Cases Paid by: Josh Garner Receipt number: 0056547 Dated: 10/31/2008 Amount: \$58.00 (Cash) For: Jenks Brothers, Inc., (defendant)
	NOAP	MACE	Defendant: Jenks Brothers, Inc., Notice Of Appearance Joshua A. Garner
11/4/2008	ANSW	MACE	Answer
11/13/2008		HARRIGFELD	Filing: I7 - All Other Cases Paid by: Joshua Garner Receipt number: 0056822 Dated: 11/13/2008 Amount: \$58.00 (Check) For: Idaho Trademark Properties, (defendant)
	ANSW	HARRIGFELD	Answer to Plaintiff's Complaint
11/14/2008	NOTC	MACE	Notice Of Intent To Take Default
11/18/2008	NOTC	MACE	Notice Of Service
12/24/2008	NOAP	MACE	Defendant: Idaho Trademark Properties, Notice Of Appearance Joshua A. Garner
1/28/2009	ANSW	MACE	Answer
2/2/2009		MACE	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: Kent Gauchey Receipt number: 0058218 Dated: 2/2/2009 Amount: \$58.00 (Check) For: Garn, Kevin (defendant)
	NOAP	MACE	Defendant: Garn, Kevin Notice Of Appearance Kent W. Gauchay
	NOAP	MACE	Notice Of Appearance
	NOTC	MACE	Notice

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
2/2/2009	MISC	MACE	Defendants First Set Of Interog. And Production Of Documents To Plaintiff
2/3/2009	NOTC	MACE	Notice Of Service
3/10/2009	ORDR	MACE	Order Extending Time For Discovery
3/12/2009	NOTC	MACE	Amended Notice of Compliance
	NOTC	MACE	Notice of Compliance
3/25/2009	NOTC	MACE	Notice Of Service
4/27/2009	DISA	MACE	Disqualification Of Judge - Automatic (batch process)
1/20/2010	HRSC	MACE	Hearing Scheduled (Hearing 02/23/2010 02:30 PM) Motion For Summary Judgment-30-45 Minutes
1/21/2010	NOTC	MACE	Notice Of Hearing
	AFFD	MACE	Affidavit Of Jill Magleby In Support Of Partial Summary Judgment
	AFFD	MACE	Affidavit Of Chris Magleby In Support Of Partial Summary Judgment
	MISC	MACE	Plaintiffs Motion For Partial Summary Judgment
2/8/2010	MISC	MACE	Defendants Brief In Response To Plaintiffs Motion For Partial Summary Judgment
	AFFD	MACE	Affidavit Of Tony Jenks
	AFFD	HARRIGFELD	Affidavit of Brandon Jenks
2/17/2010	MOTN	MACE	Motion To Strike
	MISC	MACE	Plaintiffs Reply Brief In Support Of Motion For Partial Summary Judgment
2/23/2010	MINE	HARRIGFELD	Minute Entry
3/4/2010	ORDR	HARRIGFELD	Order of Self-Disqualified Pursuant to I.R.C.P.
3/9/2010	ORDR	MACE	Order Of Assignment-Judge Simpson
	MISC	MACE	Copy Of File Mailed To Judge Simpson
3/12/2010	NOTC	MACE	Notice Of Service-Plaintiffs Second Set Of Interog.
4/5/2010	ORDR	MACE	Order Directing Copies Of All Documents To Be Transmitted To The Presiding Judge At His Resident Chambers
4/7/2010	MISC	MACE	Note Of Issue And Request For Trial Setting
4/9/2010	HRSC	MACE	Hearing Scheduled (Hearing 05/21/2010 03:00 PM) Motion For Partial Summary Judgment
	NOTC	MACE	Notice Of Hearing-Filed In Chambers April 8, 2010
4/15/2010	MISC	MACE	Response To Note Of Issue
4/23/2010	HRSC	MACE	Hearing Scheduled (Hearing 05/03/2010 11:00 AM) In Bingham CO. Status

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
4/23/2010	NOTC	HARRIGFELD	Notice of Hearing - Filed in Chambers April 22, 2010 Darren B. Simpson
4/26/2010	MISC	MACE	Partial Publication Of The Deposition Of Anthony Jenks Darren B. Simpson
	MISC	MACE	Partial Publication Of The Deposition Of Brandon Jenks Darren B. Simpson
5/3/2010	MISC	MACE	Notice Of Taking Deposition-Brandon Jenks and Anthony Jenks Darren B. Simpson
5/5/2010	ORDR	HARRIGFELD	Order Vacating Hearing - Filed in Chambers Darren B. Simpson
5/21/2010	HRVC	MACE	Hearing result for Hearing held on 02/23/2010 02:30 PM: Hearing Vacated Motion For Summary Judgment-30-45 Minutes Gregory W. Moeller
	HRHD	MACE	Hearing result for Hearing held on 05/21/2010 03:00 PM: Hearing Held Motion For Partial Summary Judgment Darren B. Simpson
	HRVC	MACE	Hearing result for Hearing held on 05/03/2010 11:00 AM: Hearing Vacated In Bingham CO. Status Darren B. Simpson
	MINE	HARRIGFELD	Minute Entry Darren B. Simpson
	HRSC	MACE	Hearing Scheduled (Hearing 06/28/2010 01:15 PM) Status Hearing Darren B. Simpson
	HRSC	MACE	Hearing Scheduled (Court Trial 10/05/2010 09:00 AM) Darren B. Simpson
	HRSC	MACE	Hearing Scheduled (Pre Trial Conference 09/03/2010 11:15 AM) Pretrial Hearing Will Be In Bonneville County Darren B. Simpson
		MACE	Notice Of Trial Setting and Order Governing Further Proceedings Darren B. Simpson
	NOTC	HARRIGFELD	Notice of Hearing Darren B. Simpson
	MINE	HARRIGFELD	Minute Entry Darren B. Simpson
6/9/2010	AMEN	HARRIGFELD	Amended Notice of Hearing - Filed in Chambers Darren B. Simpson
6/11/2010	HRSC	MACE	Hearing Scheduled (Hearing 06/28/2010 11:15 AM) Status Hearing-Telephonic To Be Held in Bingham Co. Darren B. Simpson
6/28/2010	HRHD	MACE	Hearing result for Hearing held on 06/28/2010 11:15 AM: Hearing Held Status Hearing-Telephonic To Be Held in Bingham Co. Darren B. Simpson
6/29/2010	MINE	MACE	Minute Entry-Filed In Chambers Darren B. Simpson
7/12/2010	ORDR	MACE	Order Granting In Part Plaintiffs Motion For Partial Summary Judgment-Filed In Chambers Darren B. Simpson
7/15/2010	NOTC	MACE	Notice Of Service-Request For Inspection Darren B. Simpson
	MISC	MACE	Request For Inspection Darren B. Simpson
8/10/2010	NOTC	MACE	Notice Of Telephonic Appearance-Kent Gauchay Darren B. Simpson
	NOTC	MACE	Notice Of Telephonic Appearance-David Johnson Darren B. Simpson

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
8/20/2010	HRSC	MACE	Hearing Scheduled (Hearing 08/20/2010 10:30 AM) Motion To Withdraw
	HRHD	MACE	Hearing result for Hearing held on 08/20/2010 10:30 AM: Hearing Held Motion To Withdraw
	MINE	MACE	Minute Entry
	ORDR	MACE	Order To Withdraw As Attorney Of Record-Josh Garner
8/23/2010	AFFD	MACE	Affidavit Of Service
	NOTC	MACE	Notice Of Hearing
	MOTN	MACE	Motion To Compel Re: Request For Inspection
	AFFD	MACE	Affidavit In Support Of Motion To Compel
9/2/2010	AMEN	HARRIGFELD	Amended Minute Entry - Filed in Chambers
9/7/2010	MISC	MACE	Plaintiffs Witness And Exhibit List
9/14/2010	APPL	HARRIGFELD	Application for Default
	AFFD	HARRIGFELD	Affidavit Calculating Interest and in Support of Attorney Fees and Costs
9/22/2010	MISC	HARRIGFELD	Entry of Default and Default Judgment sent to Judge Simpson
9/24/2010	HRVC	MACE	Hearing result for Pre Trial Conference held on 09/03/2010 11:15 AM: Hearing Vacated Pretrial Hearing Will Be In Bonneville County
9/27/2010	DEFT	HARRIGFELD	Entry of Default
	DFJD	HARRIGFELD	Default Judgment Entered Without Hearing
	CDIS	HARRIGFELD	Civil Disposition: entered for: Idaho Trademark Properties,, Defendant; Jenks Brothers, Inc., Defendant; Magleby, Christopher J, Plaintiff; Magleby, Jill, Plaintiff; Selective Builders,, Plaintiff. Filing date: 9/27/2010
9/29/2010	MOTN	HARRIGFELD	Motion to Alter, Amend or Reconsider
9/30/2010	MINE	HARRIGFELD	Minute Entry - Filed in Chambers
10/5/2010	MINE	MACE	Minute Entry Hearing type: Court Trial Hearing date: 10/5/2010 Time: 9:06 am Courtroom: Court reporter: Minutes Clerk: MACE Tape Number: Disk 28 Party: Idaho Trademark Properties, Attorney: Joshua Garner Party: Christopher Magleby, Attorney: David Johnson Party: Jill Magleby
	MOTN	MACE	Motion To Set Aside Default And Default Judgment.
	EXHI	MACE	Exhibits-Plaintiffs 1-5. Ex. 1 and 2 admitted.

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
10/5/2010	NOTC	MACE	Notice Of Hearing-Status. Notice Does Not Say Which County Darren B. Simpson
10/7/2010	HRHD	PARKER	Hearing result for Court Trial held on 10/05/2010 09:00 AM: Hearing Held Darren B. Simpson
10/12/2010	MISC	MACE	Memorandum In Support Of Motion For Costs And Fees Darren B. Simpson
	MOTN	MACE	Motion For Costs And Fees Darren B. Simpson
10/13/2010	AFFD	MACE	Affidavit Of David A. Johnson (Second) Calculating Interest And In Support Of Attorney Fees And Costs. Darren B. Simpson
10/15/2010	HRSC	MACE	Hearing Scheduled (Hearing 11/12/2010 02:00 PM) Motion For Entry Of Judgment, Decree Of Foreclosure and Order Of Sale, Motion For Costs and Fees, Motion To Set Aside Default And Default Judgment-In Fremont County Darren B. Simpson
	MOTN	HARRIGFELD	Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale Darren B. Simpson
	NOTC	HARRIGFELD	Notice of Hearing Darren B. Simpson
10/26/2010	MOTN	MACE	Motion To Disallow Attorney Fees And Costs Darren B. Simpson
	MISC	MACE	Memorandum In Support Of Motion To Disallow Attorney Fees And Costs. Darren B. Simpson
10/27/2010	MINE	HARRIGFELD	Minute Entry Darren B. Simpson
	MINE	HARRIGFELD	Minute Entry Darren B. Simpson
10/28/2010	NOTC	MACE	Notice-Amended Notice Of Hearing Darren B. Simpson
11/12/2010	HRHD	MACE	Hearing result for Hearing held on 11/12/2010 02:00 PM: Hearing Held Motion For Entry Of Judgment, Decree Of Foreclosure and Order Of Sale, Motion For Costs and Fees, Motion To Set Aside Default And Default Judgment Darren B. Simpson
	MINE	MACE	Minute Entry Hearing type: Hearing-Motions-Judgment-Foreclosure-Cost Hearing date: 11/12/2010 Time: 2:00 pm Courtroom: Court reporter: Minutes Clerk: MACE Tape Number: Party: Idaho Trademark Properties, Attorney: Joshua Garner Party: Christopher Magleby, Attorney: David Johnson Party: Kevin Garn, Attorney: Kent Gauchay Darren B. Simpson
	NOTC	MACE	Notice Of Appearance-Dale Thomson-No Filing Fee Paid As Of This Date. Darren B. Simpson
	MISC	MACE	Objection To Attorney Fees In Opposition To Rule 60(b) Darren B. Simpson

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
11/12/2010		MACE	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Dale Thomson Receipt number: 0071341 Dated: 11/12/2010 Amount: \$58.00 (Check) For: Idaho Trademark Properties, (defendant)
	NOAP	MACE	Defendant: Idaho Trademark Properties, Notice Of Appearance Dale P. Thomson
12/14/2010	ORDR	MACE	Order Regarding Attorney Fees. Filed In Chambers
12/17/2010	MISC	MACE	Maglebys Fee Motion Granted In Part.
12/20/2010	AFFD	MACE	Affidavit Calculating Interest Against Kevin And Tanya Garn
	MISC	MACE	Judgment, Decree Of Foreclosure And Order Of Sale Sent To Judge Simpson
12/21/2010	WRIT	MACE	Writ Issued
1/11/2011	CDIS	MACE	Civil Disposition: entered for: Garn, Kevin, Defendant; Garn, Tonya, Defendant; Jenks Brothers, Inc., Defendant; Magleby, Christopher J, Plaintiff; Magleby, Jill, Plaintiff; Selective Builders,, Plaintiff; Idaho Trademark Properties,, Defendant. Filing date: 1/11/2011
	CSCG	MACE	Case Status Changed: Closed
1/12/2011	JDMT	MACE	Judgment, Decree Of Foreclosure And Order Of Sale-Filed In Chambers 1-11-2011
1/18/2011	AFFD	MACE	Affidavit Of David Johnson (Third) Calculation Of Interest
	MISC	MACE	Order Sent To Judge Simpson's Chambers For Signatures.-Order Is Final Judgment.
3/1/2011	MOTN	MACE	Motion For Preliminary Injunction And Temporary Restraining Order
	NOTC	MACE	Notice Of Hearing-Telephonic March 2, 2011 at 9:30 am With Honorable Judge Simpson in Chambers
3/2/2011	AFFD	MACE	Affidavit Of David Johnson
	MISC	MACE	Brief In Support Of Motion For Preliminary Injunction And Temporary Restraining Order
3/3/2011	AFFD	MACE	Affidavit Of Brian R. Langford
3/8/2011	MINE	MACE	Minute Entry
3/15/2011	MOTN	MACE	Motion For Costs And Attorney Fees
	MISC	MACE	Memorandum Of Costs And Attorney Fees
	NOTC	HARRIGFELD	Notice of Hearing
3/21/2011	MOTN	MACE	Motion And Objection To Attorney Fees And Costs.
3/25/2011	MISC	MACE	Response To Idaho Trademark Properties Motion And Objection To Attorney Fees And Costs.

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
3/29/2011	MOTN	MACE	Motion To Disallow Costs And Fees, Objection To Plaintiffs Motion For Costs And Attorney Fees. Darren B. Simpson
4/8/2011	MISC	MACE	Hearing On Motions April 19, 2011 at 10:00-Attorney Fees And Costs. Darren B. Simpson
	HRSC	MACE	Hearing Scheduled (Hearing 04/19/2011 10:00 AM) Hearing On Motions-Attorney Fees And Costs. Darren B. Simpson
	CSCG	MACE	Case Status Changed: Closed pending clerk action Darren B. Simpson
	NOTC	MACE	Notice-Amended Darren B. Simpson
4/13/2011	MISC	MACE	Response To Idaho Trademark Properties Motion And Objection To Attorney Fees And Costs. Darren B. Simpson
4/14/2011	MISC	MACE	Response To Defendant Garns Objection To Attorney Fees And Costs. Darren B. Simpson
4/19/2011	HRHD	MACE	Hearing result for Hearing held on 04/19/2011 10:00 AM: Hearing Held Hearing On Motions-Attorney Fees And Costs. Darren B. Simpson
	MINE	MACE	Minute Entry-Copy Emailed To Jaime Darren B. Simpson
	MISC	MACE	Memorandum In Support Of Motion To Disallow Costs and Fees. Darren B. Simpson
4/26/2011	MINE	HARRIGFELD	Minute Entry Darren B. Simpson
6/17/2011	ORDR	MACE	Order Granting In Part Plaintiffs Motion For Post Judgment Attorney Fees And Costs. Filed In Chambers. Darren B. Simpson
7/8/2011	MOTN	MACE	Motion-Amended Motion For Entry Of Judgment, Decree And Foreclosure Order Of Sale Against Garns(copy) Original sent to Judge Simpson's chambers. Darren B. Simpson
	MOTN	MACE	Motion-Amended Motion For Entry Of Judgment against Def. Idaho Trademark Properties and Jenks Brothers.(copy, original sent to Judge Simpson's chambers) Darren B. Simpson
	AFFD	MACE	Affidavit Calculating Interest Against Kevin Garn and Tanya Garn. Second Affd. Of David Johnson Calculating Interest(copy, Original sent to Judge Simpson's chambers) Darren B. Simpson
	MISC	MACE	Proposed Amended Judgment,Decree and Foreclosure(Original sent to Judge Simpson's chambers) Proposed Final Judgment against Defendants(Original to Judge Simpson's Chambers) Darren B. Simpson
7/27/2011	NOTC	MACE	Notice Of Proposed Dismissal Of Cross Claim.Filed In Chambers July 25, 2011. Darren B. Simpson
8/19/2011	MOTN	MACE	Motion To Retain-For Additional 3 Months Darren B. Simpson
	AFFD	MACE	Affidavit Of Kent Gauchay-In Support Of Motion To Retain Darren B. Simpson
	MOTN	MACE	Motion For Summary Judgment Darren B. Simpson

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
8/19/2011	MEMO	MACE	Memorandum In Support Of Motion For Summary Judgment Darren B. Simpson
	AFFD	MACE	Affidavit Of Kent Gauchay In Support Of Motion For Summary Judgment Darren B. Simpson
10/4/2011		HARRIGFELD	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: David A. Johnson Receipt number: 0005050 Dated: 10/4/2011 Amount: \$101.00 (Check) For: Magleby, Christopher J (plaintiff) Darren B. Simpson
	APLS	HARRIGFELD	Appeal to Supreme Court Darren B. Simpson
	CSCG	HARRIGFELD	Case Status Changed: Reopened Darren B. Simpson
10/5/2011	NOTC	HARRIGFELD	Notice of Hearing Darren B. Simpson
10/7/2011	HRSC	MACE	Hearing Scheduled (Hearing 11/08/2011 09:00 AM) Status Hearing-In Bingham? Darren B. Simpson
10/19/2011	BNDC	HARRIGFELD	Bond Posted - Cash (Receipt 5290 Dated 10/19/2011 for 433.55) Darren B. Simpson
	BONC	HARRIGFELD	Condition of Bond Payment for Electronic Appeal Record Darren B. Simpson
10/27/2011	MISC	HARRIGFELD	Clerk's Certificate Filed - Appeal Docket No. 39264-2011 Darren B. Simpson
	MISC	HARRIGFELD	Clerk's Record / Reporter's Transcript Suspended - Suspended to 11/15/11 for Response to Conditionally Dismiss Darren B. Simpson
	ORDR	HARRIGFELD	Order Conditionally Dismissing Appeal Darren B. Simpson
10/31/2011	AMEN	HARRIGFELD	Amended Order Conditionally Dismissing Appeal Darren B. Simpson
11/9/2011	DFJD	MACE	Default Judgment Entered Without Hearing-First Amended Default Judgment Against Defendants Idaho Trademark Properties and Jenks Bro. Filed In Chambers Darren B. Simpson
	JDMT	MACE	Judgment-Filed In Chambers. Darren B. Simpson
	MINE	MACE	Minute Entry-Filed In Chambers Darren B. Simpson
	CDIS	MACE	Civil Disposition: entered for: Idaho Trademark Properties,, Defendant; Jenks Brothers, Inc., Defendant; Magleby, Christopher J, Plaintiff; Magleby, Jill, Plaintiff. Filing date: 11/9/2011 Darren B. Simpson
	CDIS	MACE	Civil Disposition: entered for: Garn, Kevin, Defendant; Garn, Tonya, Defendant; Magleby, Christopher J, Plaintiff; Magleby, Jill, Plaintiff. Filing date: 11/9/2011 Darren B. Simpson
11/16/2011	AMEN	HARRIGFELD	Amended Notice of Appeal Darren B. Simpson
11/21/2011	MISC	HARRIGFELD	Notification from Supreme Court that Response to Order Conditionally Dismissing Appeal filed by Appellants Darren B. Simpson
12/2/2011	MISC	HARRIGFELD	Amended Notice of Appeal Received by the Court of Appeal Darren B. Simpson

Date: 3/12/2012

Seventh Judicial District Court - Fremont County

User: HARRIGFELD

Time: 09:54 AM

ROA Report

Page 9 of 9

Case: CV-2008-0000469 Current Judge: Darren B. Simpson

Christopher J Magleby, etal. vs. Kevin Garn, etal.

Christopher J Magleby, Jill Magleby, Selective Builders vs. Kevin Garn, Tonya Garn, Idaho Trademark Properties, Jenks Brothers, Inc.

Date	Code	User	Judge
12/5/2011	MISC	HARRIGFELD	Clerk's Record and Transcript Due Date Reset - DUE DATE 3/6/12
	ORDR	HARRIGFELD	Order to Reinstate Appellate Proceedings
	MISC	HARRIGFELD	Transmittal of Document - Letter regarding Jenks Brothers
12/16/2011	MISC	HARRIGFELD	Transmittal from Court of Appeals - Motion to Withdraw as Attorney of Record and Affidavit in Support by Dale Thomson, attorney for Defendant-Respondent Trademark Properties on 12/12/11
1/23/2012	MISC	HARRIGFELD	Clerk's Record and Transcript Due Date Reset - DUE DATE 3/20/12
2/7/2012	TRAN	HARRIGFELD	Transcript Filed

ORIGINAL

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08- 469

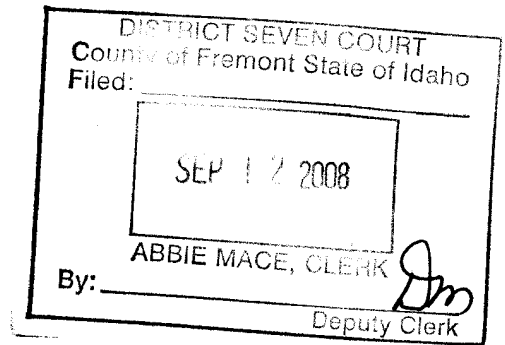
COMPLAINT

Fee Category: A.
Fee: \$88.00

Plaintiffs Chris and Jill Magleby (Maglebys), for a cause of action against the above-named Defendants, complain and allege as follows:

1. Magelbys are residents of Bonneville County, Idaho, and are involved in the construction industry in the East Idaho area.
2. Defendants Kevin and Tanya Garn (Garns) are residents of the State of Utah, but own real property which is the subject of this litigation.

1- COMPLAINT



ASSIGNED JUDGE:
BRENT J. MOSS

3. Defendant Idaho Trademark Properties, LLC, (ITP) is an Idaho limited liability company with its principal place of business in Rexburg, Idaho.
4. Jenks Brothers, Inc. (Jenks) is an Idaho corporation with its principal place of business in Rexburg, Idaho.
5. Does 1-10 are unknown persons or entities who have, or may claim to have, an interest in the real property which is the subject of this litigation or may have liability for the money owed to Maglebys.
6. The managers of ITP, at all relevant times to this litigation, consisted of Brady Gardner, Chris Ferguson, Michael Ferguson, Brandon Jenks ,and Tony Jenks.
7. The officers, managers, and/or owners of Jenks, at all relevant times to this litigation, were Tony Jenks and Brandon Jenks.
8. In or about July 2007, ITP was the owner of real property located at 3635 Redtail Street, Island Park, Idaho (Subject Property), more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1,
Division 3, Fremont County, Idaho
9. In or about July 2007, Brandon Jenks and Tony Jenks approached Maglebys and requested their services, labor, and skills, in the construction of the improvements on the Subject Property.
10. Jenks promised that in exchange for their services, Maglebys would receive 1.5% of the sales price of the Subject Property.
11. Maglebys agreed to the agreement and thereafter performed various services on the Subject Property and installed various materials to the Subject Property, including, but not limited to, management of subcontractors, acting as a liaison/contact person between ITP and Garns, painting, tiling, interior decorating, carpeting, and installing hardwood floors.
12. The above-identified services and materials were provided and the work was substantially completed in July 2008, including follow-up repair work.

2- COMPLAINT

13. ITP sold the Subject Property to Garns in November 2007, for \$1,550,000.00 in both funds and the exchange of real property.
14. Maglebys furnished materials and labor to the Subject Property having a value in excess of \$23,250.00.
15. Pursuant to the parties agreement, Maglebys are entitled to \$23,250.00 for their labor, services, and materials.
16. Even though the Subject Property has been sold, Maglebys have not been paid for the services and materials they provided.
17. Defendants ITP and/or Jenks are currently indebted to Maglebys for \$23,250.00.
18. The transaction between ITP, Jenks, and Maglebys was a commercial transaction.

**FIRST CAUSE OF ACTION
(Mechanics and Materialmen's Lien)**

19. Maglebys incorporate by reference paragraphs 1-18 above as if fully set forth herein.
20. On or about March 10, 2008, pursuant to statutory authority, Maglebys filed a Claim of Lien on the Subject Property, which was filed with the Fremont County Recorder, State of Idaho, and recorded as instrument number 515729. A copy of the Claim of Lien is attached hereto as Exhibit A.
21. Maglebys have complied with all requirements for service of the Claim of Lien, including sending a copy of the Claim of Lien to Garns by certified mail on March 11, 2008.
22. After the allowance of all just and lawful offsets, payments, and credits to Defendants, there remains a balance of \$23,250.00 due and unpaid.
23. Maglebys have a valid claim of interest, pursuant to Idaho Code §45-701 et. seq., to the Subject Property.
24. Maglebys have not been fully paid for the services and materials provided to the Subject Property, are entitled to foreclosure on the Subject

3- COMPLAINT

Property, and are entitled to require the Subject Property be sold to satisfy their claims.

**SECOND CAUSE OF ACTION
(Contract)**

25. Maglebys incorporate by reference paragraphs 1-24 above as if fully set forth herein.
26. Through the parties conversations and actions, Maglebys, ITP and/or Jenks formed an agreement, wherein Maglebys would provide the services and materials described above and ITP and/or Jenks would pay the Maglebys 1.5% of the gross sales proceeds from the sale of the Subject Property.
27. Maglebys provided the agreed upon services and materials as requested by ITP and/or Jenks.
28. After demand for payment, ITP and Jenks has failed to pay for the services and materials provided to them by Maglebys.
29. By failing to pay for such services and materials, ITP and Jenks have breached their agreement with Maglebys.
30. Maglebys has been damaged in the sum of \$23,250.00, together with interest at the legal rate thereon from the date of the sale of the Subject Property.

**THIRD CAUSE OF ACTION
(Unjust Enrichment)**

31. Maglebys incorporate by reference paragraphs 1-30 as if fully set forth herein.
32. The materials installed on the Subject Property have substantial value, which value is in excess of \$23,250.00. This value is established in terms of the value of the services and materials and in the increase in value of the Subject Property.
33. Defendants knew of the installation of the benefits described above and accepted, acquiesced to, and particularly participated in making the improvements to the Subject Property.

4- COMPLAINT

34. Under the totality of the circumstances of this case, it would be inequitable for the Defendants to retain the above-described benefits without reasonable compensation to Maglebys.

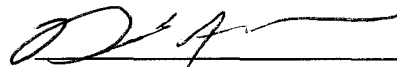
REQUEST FOR ATTORNEY FEES

35. Despite demands by Maglebys to Defendant for payment made at least ten (10) days prior to the filing of this action, Defendant has refused and continues to refuse to pay said obligation. Maglebys have been required to retain an attorney to initiate and prosecute this action. Maglebys are entitled to recover their reasonable attorney's fees and Court costs of \$2,500.00, pursuant to Idaho Code §§ 12-120 and 45-513, if uncontested further. If contested, the amount of attorney fees and Court costs awarded should be the actual cost of attorney fees and Court costs.

WHEREFORE, Maglebys pray for relief as follows:

1. For a judgment of \$23,250.00, together with legal interest thereon against the Defendants.
2. For all attorney fees and Court costs incurred by Maglebys.
3. For an order directing the Fremont County Sheriff to execute a foreclosure sale on the Subject Property to satisfy the judgment herein.
4. For such other and further relief as the Court deems proper.

DATED: September 9, 2008



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

VERIFICATION

STATE OF IDAHO)
 : ss.
County of Bonneville)

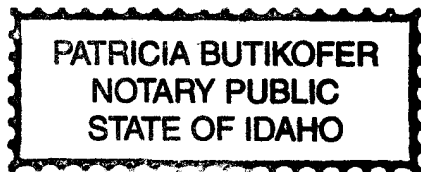
Jill Magelby, being first duly sworn deposes and says that I am a Plaintiff in the foregoing action, I have read the foregoing document, know the contents thereof, and the same is true and correct to the best of my knowledge and belief.

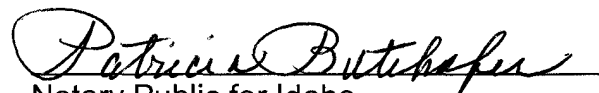
DATED: September 9, 2008



Jill Magelby

SUBSCRIBED AND SWORN TO before me on September 9, 2008.





Notary Public for Idaho
Commission expires: 4/23/2010

Microfilm No. 515729
10 Day 7 Jan 20 18
At 2:00 P.M.
ABBIE MACE
FREMONT CO RECORDER
Fee \$ 3 Deputy
Recorded at Request of
PO # 52251
83405
2251

CLAIM OF LIEN

NOTICE IS HEREBY GIVEN that, Chris and Jill Magleby, d.b.a. Selective Builders (Claimants), have furnished labor and materials to Kevin and Tanya Garn, owners of properties located at 3635 Redtail Street, Island Park, ID 83429, more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3,
Fremont County, Idaho.

Kevin and Tanya Garn, 2206 East Summerwood Drive, Layton, UT 84040, are the owners or reputed owners of the above-described real property. Claimants, at the instance and request of said owners or their agent, furnished services on the above-described real property, which have been incorporated into the subject property or has benefitted the subject property by such services.

Claimants began to furnish labor and materials in July, 2007, and are continuing work on the subject property. Claimants' claims a lien upon the above-described real property of \$23,250.00, is comprised primarily of professional services. Such services, labor, and materials, are the fair and reasonable value of labor and materials furnished. Attorney fees and costs for filing this Claim of Lien are \$250.00 in addition to the amount claimed

DATED: March 7, 2008


Jill Magleby

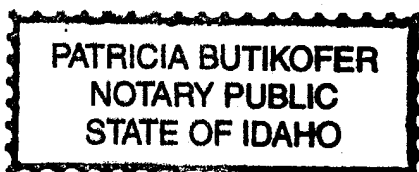
STATE OF IDAHO)
: ss.
County of Bonneville)


Jill Magleby, being first duly sworn, deposes and says that she has read the foregoing document, knows the contents thereof; and believes the facts stated therein to be true and the claim to be just.

DATED: March 7, 2008


Jill Magleby

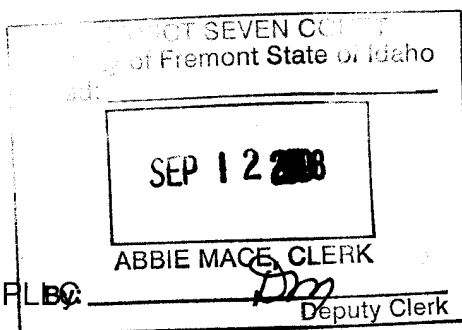
SUBSCRIBED AND SWORN TO before me March 7, 2008.




Notary Public for Idaho
Commission expires: 4/23/2010

CLAIM OF LIEN

EXHIBIT A



David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

ORIGINAL

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08- 469

SUMMONS

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFFS THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER
NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE
INFORMATION BELOW.**

TO: JENKS BROTHERS, INC.

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an
appropriate written response must be filed with the above-designated Court within 20

1- SUMMONS

**DOCUMENT
SCANNED**

days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Complaint.

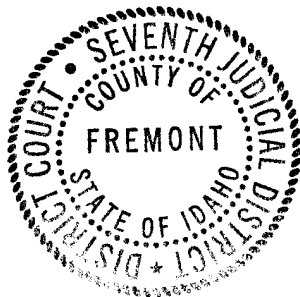
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

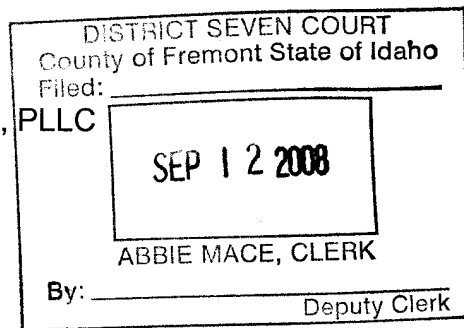
DATED: September 12, 2008.



Abbie Mace
Clerk of the District Court

By: Deborah Mace
Deputy

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

ORIGINAL

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08- 469

SUMMONS

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFFS THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER
NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE
INFORMATION BELOW.**

TO: IDAHO TRADEMARK PROPERTIES, LLC

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an
appropriate written response must be filed with the above-designated Court within 20

1- SUMMONS

days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Complaint.

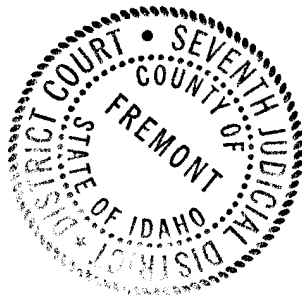
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED: September 12, 2008.

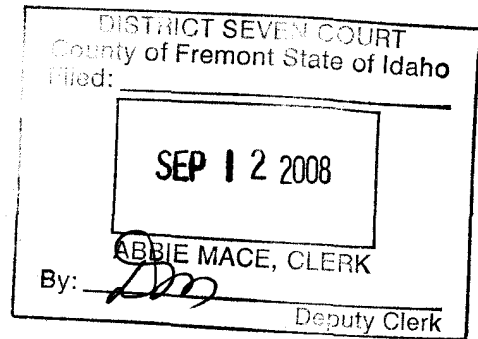


Abbie Mace
Clerk of the District Court

By: Deborah Mace
Deputy

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs



ORIGINAL

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08- 469

SUMMONS

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFFS THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER
NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE
INFORMATION BELOW.**

TO: KEVIN AND TANYA GARN

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an
appropriate written response must be filed with the above-designated Court within 20

1- SUMMONS

days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Complaint.

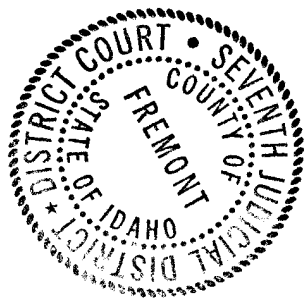
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED: September 12, 2008.



Abbie Mae
Clerk of the District Court

By: Abbie Mae
Deputy

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, DBA
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendants.

Case No: CV-08-469

AFFIDAVIT OF SERVICE

DISTRICT SEVEN COURT County of Fremont, State of Idaho	
Filed:	
SEP 24 2008	
ABBIE MACE, CLERK <i>AM</i>	
By:	
Deputy Clerk	

SHARON/RALPH NIXON, being first duly sworn under oath, deposes and says:
That (s)he is a resident of the County of Bonneville, State of Idaho; that (s)he is over
the age of 18 years; that (s)he is not a party to the action or related to any of the parties
in the above-entitled action, and that (s)he delivered a copy or copies of:

Summons and Complaint

personally upon the above-named Defendant OR by leaving with a person 18 years of
age or older residing at Defendant's usual place of abode.

Person Served: Gregory J. Ehardt, Registered Agent for
Jenks Brothers, Inc.

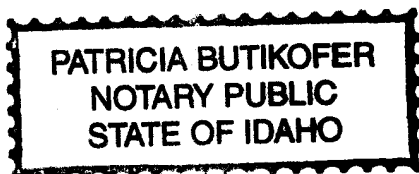
Address Served: 803 pescadero
Idaho Falls Id

Date of Service: 9-17-08, 2008.

Service Fee: \$ 25.00

Process Server: Sharon Nixon
Sharon/Ralph Nixon

SUBSCRIBED AND SWORN before me September 18, 2008.



Patricia Butikofer
Notary Public for the State of Idaho
Commission expires: 4/23/2010

AFFIDAVIT OF SERVICE

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, DBA
SELECTIVE BUILDERS,

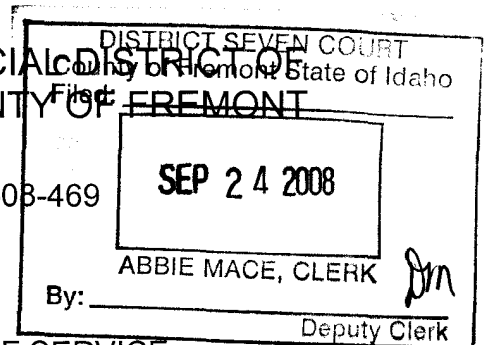
Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendants.

Case No: CV-08-469



AFFIDAVIT OF SERVICE

SHARON/RALPH NIXON, being first duly sworn under oath, deposes and says:
That (s)he is a resident of the County of Bonneville, State of Idaho; that (s)he is over
the age of 18 years; that (s)he is not a party to the action or related to any of the parties
in the above-entitled action, and that (s)he delivered a copy or copies of:

Summons and Complaint

personally upon the above-named Defendant OR by leaving with a person 18 years of
age or older residing at Defendant's usual place of abode.

Person Served: Gregory J. Ehardt, Registered Agent for
Idaho Trademark Properties, LLC

Address Served: 803 Perodaro

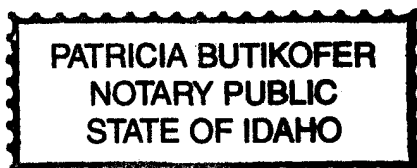
Idaho Falls Idh

Date of Service: 9-17-, 2008.

Service Fee: \$ 30.00

Process Server: Sharon Nixon
Sharon/Ralph Nixon

SUBSCRIBED AND SWORN before me September 18, 2008.

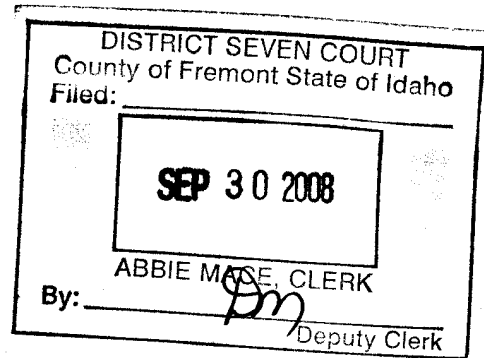


Patricia Butikofer
Notary Public for the State of Idaho
Commission expires: 4/23/2010

AFFIDAVIT OF SERVICE

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No: CV-08-469

AFFIDAVIT IN SUPPORT OF
MOTION FOR SERVICE OUTSIDE
THE STATE OF IDAHO

STATE OF IDAHO)
 : ss.
County of Bonneville)

Jill Magelby, being first duly sworn, deposes and says:

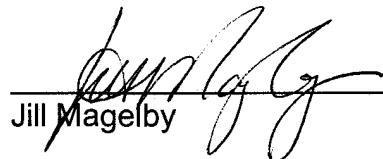
1. I am a Plaintiff in this matter and I am entirely familiar with the facts and circumstances herein.

1 - AFFIDAVIT SUPPORTING SERVICE OUTSIDE THE STATE OF IDAHO

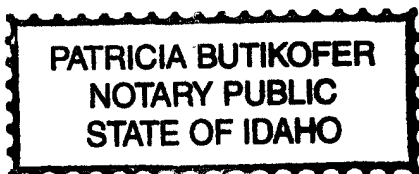
2. This Affidavit is in support of a Motion for Service Outside the State of Idaho, requesting an Order directing that service of the Summons be made upon Defendants Kevin and Tanya Garn, by personal service outside the State of Idaho.
3. This is an action for collection.
4. The Complaint was filed with the Clerk of this Court and a Summons was issued. A good cause of action exists because Defendants are parties to this action.
5. Defendants currently reside in Layton, Utah, which fact is known to me personally.

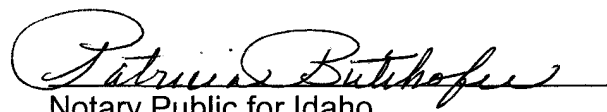
WHEREFORE, Affiant prays for an Order of this Court directing that service of the Summons and Complaint be made upon Defendants Kevin and Tanya Garn outside the State of Idaho.

DATED: September 18, 2008.

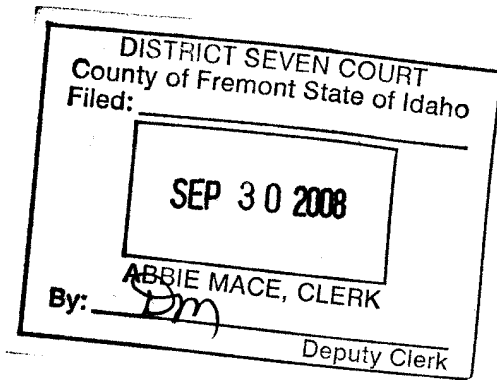

Jill Magelby

SUBSCRIBED AND SWORN to before me on September 18, 2008.




Notary Public for Idaho
Commission expires: 4/23/2010

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

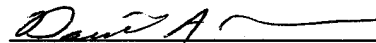
Defendants.

Case No: CV-08-469

MOTION FOR SERVICE OUTSIDE
THE STATE OF IDAHO

Plaintiffs Chris and Jill Magelby, by and through their attorney David A. Johnson, hereby moves the Court for an Order directing personal service of the Summons and Complaint upon Defendants Kevin and Tanya Garn, who currently reside in Layton, Utah, in lieu of publication and mailing, by personally serving Defendants with a copy of the aforementioned documents. Defendants reside in the State of Utah, being Defendants whereabouts outside the State of Idaho.

DATED: September 19, 2008.



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

MOTION FOR SERVICE OUTSIDE THE STATE OF IDAHO

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

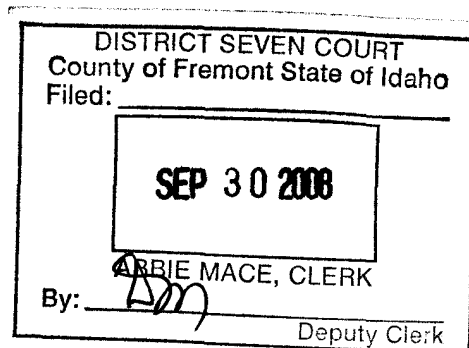
Case No: CV-08-469

ORDER DIRECTING SERVICE
OUTSIDE THE STATE OF IDAHO

Based upon the Motion for Service Outside of the State of Idaho filed by Plaintiffs Chris and Jill Magelby, by and through their attorney David A. Johnson, for an Order directing service of the Complaint and Summons upon Defendants Kevin and Tanya Garn, residing in the State of Utah, by personal service outside of the State of Idaho; and

It appearing to the Court from the Affidavit filed herein, that a good cause of action exists in favor of Plaintiffs and against Defendants, who are necessary and proper parties to this action; and

1-ORDER DIRECTING SERVICE OUTSIDE THE STATE OF IDAHO



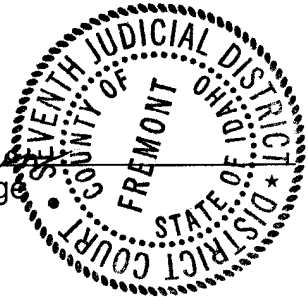
It further appearing that a Summons was duly issued; and

It further appearing that Defendants reside in the State of Utah;

IT IS HEREBY ORDERED that service of the Summons be made on Defendants Kevin and Tanya Garn by personal service outside of the State of Idaho.

DATED: September 30, 2008.

Brent J. Moss
Brent J. Moss, Judge



NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled Court, and that I mailed a true copy of the foregoing document(s) on September 30, 2008, to the following attorney(s) of record and/or parties:

David A. Johnson
Wright, Johnson, Tolson & Wayment, PLLC
P.O. Box 52251
Idaho Falls, ID 83405

Abbie Mae
Clerk of the Court

By: Deborah Mae
Deputy Clerk

OCT 16 2008

County of Fremont State of Idaho

OCT 21 2008

ABBIE MACE, CLERK

By: _____ Deputy Clerk

Robert M. [Signature]
NOTARY PUBLIC
Residing at: Farmington, Utah 3-1-10
My commission expires: ~~12-31-11~~

Charge	Amount
PAPER FEE	15.00
NOTARY	5.00
MILEAGE	16.50

Plaintiff:
CHRIS AND JILL MAGLEBY DBA
SELECTIVE BUILDERS

Defendant:
KEVIN AND TANYA GARN, IDAHO
TRADEMARK PROPERTIES LLC JENKS
BROTHERS INC AND DOES 1-10

Address served to: 2206 EAST SUMMERWOOD DRIVE
LAYTON

DOCUMENT
SCANNED

81797

RECEIVED

2008 OCT -9 PM 1:16

DAVIS COUNTY
SHERIFF

COPY

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08- 469

SUMMONS

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFFS THE
COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER
NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE
INFORMATION BELOW.**

TO: KEVIN AND TANYA GARN

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an
appropriate written response must be filed with the above-designated Court within 20

1- SUMMONS

days after service of this Summons on you. If you fail to so respond, the Court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

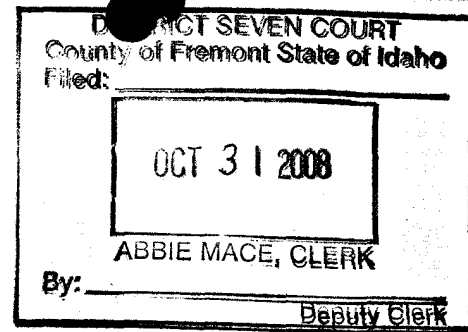
DATED: September 12, 2008.

Abbie Mace
Clerk of the District Court

By: Deborah Mace
Deputy

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Defendant



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

NOTICE OF APPEARANCE

Filing Category: I.7
File Fee: \$58.00

COMES NOW Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC., and enters an appearance for and in behalf of Defendant, JENKS BROTHERS, INC, in the above-entitled action. This appearance does not waive any defenses but in fact preserves all defenses including, but not limited to, defenses related to jurisdiction, service, and venue.

DATED this 31 day of October, 2008.

Joshua A. Garner
Attorney for JENKS BROTHERS, INC.

DOCUMENT
SCANNED

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 31 day of October, 2008, I served a copy of the foregoing
NOTICE OF APPEARANCE, on the following individuals by the method of delivery designated:

David A. Johnson
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405
(208) 523-4400

() U.S. Mail () Hand Delivered (☒) Facsimile


Joshua A. Garner

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; display: inline-block;">NOV - 4 2008</div> ABBIE MACE, CLERK By:  Deputy Clerk

Attorney for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

VERIFIED ANSWER TO
PLAINTIFFS' COMPLAINT

COMES NOW, Defendant, JENKS BROTHERS, INC., by and through its attorney of record, Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC, and does ANSWER Plaintiffs' Complaint as follows:

Defendant denies each and every allegation contained in Plaintiffs' Complaint not specifically admitted herein. Specifically, Defendant admits, denies and alleges as follows:

Paragraph 1: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 1 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 2: Admit.

Paragraph 3: Admit.

Paragraph 4: Admit.

Paragraph 5: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 5 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 6: Admit.

Paragraph 7: Admit.

Paragraph 8: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 8 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 9: Deny.

Paragraph 10: Deny.

Paragraph 11: Deny.

Paragraph 12: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 12 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 13: Admit.

Paragraph 14: Deny.

Paragraph 15: Deny.

Paragraph 16: The Defendant does not have knowledge or information sufficient to form a

belief as to the truth of the Plaintiffs' allegation contained in Paragraph 16 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 17: Deny.

Paragraph 18: Deny.

Paragraph 19: Deny.

Paragraph 20: Admit.

Paragraph 21: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 21 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 22: Deny.

Paragraph 23: Deny.

Paragraph 24: Deny.

Paragraph 25: Deny.

Paragraph 26: Deny.

Paragraph 27: Deny.

Paragraph 28: Deny.

Paragraph 29: Deny.

Paragraph 30: Deny.

Paragraph 31: Deny.

Paragraph 32: Deny.

Paragraph 33: The Defendant does not have knowledge or information sufficient to form a

belief as to the truth of the Plaintiffs' allegation contained in Paragraph 33 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 34: Deny.

Paragraph 35: Deny.

Defendant further DENIES the Plaintiffs' prayer for relief.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiffs' Complaint fails to state a claim on which relief may be granted.

Second Affirmative Defense

Plaintiffs' Complaint fails for reason that Plaintiffs, upon information and belief, are not registered with the Idaho Contractors Board as required by Idaho Code § 54-5204 *et seq.* and therefore, Plaintiff may not maintain the lien it has filed on the subject property.

Third Affirmative Defense

Plaintiffs' claims are barred in whole or in part by Plaintiff's failure to provide consideration for any alleged agreement with the Defendant.

Fourth Affirmative Defense

Plaintiffs' claim fails against Defendant for reason that the Plaintiff cannot provide a copy of any Agreement between itself and the Defendant and is therefore barred by the Statute of Frauds.

Fifth Affirmative Defense

Plaintiffs' claims are barred by the doctrine of unclean hands.

Sixth Affirmative Defense

Plaintiffs' claims are barred by the doctrines of waiver and/or estoppel.

Defendant reserves the right to amend its Answer and Affirmative Defenses as additional information is acquired by the parties.

WHEREFORE, the Defendant prays for relief as follows:

1. That Plaintiff takes nothing by its Complaint;
2. That all claims against the Defendant contained in the Complaint be dismissed with prejudice and on the merits;
3. For an award of the Defendant's costs and reasonable attorney's fees incurred herein pursuant to Idaho Code 12-120, 12-121, and Idaho Rule of Civil Procedure 54 and any other applicable rule or statute; and
4. For such other and further relief as the Court deems just and proper.

DATED this 04 day of November, 2008.

THE LAW OFFICE OF JOSHUA A. GARNER, PLLC


Joshua A. Garner

VERIFICATION

STATE OF IDAHO)
)ss.
COUNTY OF MADISON)

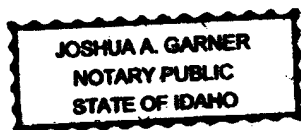
Brandon Jenks, being first duly sworn upon oath, deposes and says:

That he is the President of Jenks Brothers, Inc., the Defendant in the above-entitled action; that he has read the foregoing ANSWER, knows the contents thereof and believes the same to be true to the best of his knowledge, information and belief.



Brandon Jenks

SUBSCRIBED AND SWORN to before me this 04 day of November, 2008.





Notary Public in and for Idaho

Residing at: Rexburg, ID

Commission Expires: 10-10-2012

CERTIFICATE OF SERVICE

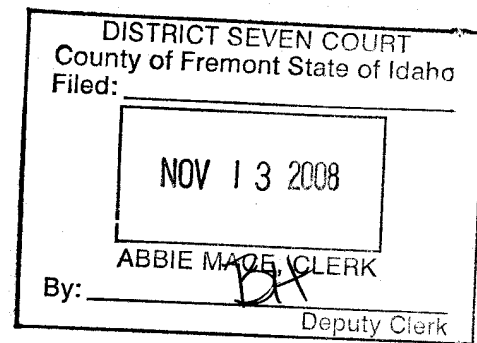
I HEREBY CERTIFY that on the 04 day of November, 2008, I served a copy of the foregoing NOTICE OF APPEARANCE, on the following individuals by the method of delivery designated:

David A. Johnson
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405
(208) 523-4400

() U.S. Mail () Hand Delivered (✓) Facsimile


Joshua A. Garner

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420



Attorney for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

ANSWER TO PLAINTIFFS' COMPLAINT

COMES NOW, Defendant, IDAHO TRADEMARK PROPERTIES, LLC, by and through its attorney of record, Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC, and does ANSWER Plaintiffs' Complaint as follows:

Defendant denies each and every allegation contained in Plaintiffs' Complaint not specifically admitted herein. Specifically, Defendant admits, denies and alleges as follows:

Paragraph 1: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 1 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 2: Admit.

Paragraph 3: Admit.

Paragraph 4: Admit.

Paragraph 5: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 5 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 6: Admit.

Paragraph 7: Admit.

Paragraph 8: Admit.

Paragraph 9: Deny.

Paragraph 10: Deny.

Paragraph 11: Deny.

Paragraph 12: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 12 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 13: Admit.

Paragraph 14: Deny.

Paragraph 15: Deny.

Paragraph 16: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 16 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 17: Deny.

Paragraph 18: Deny.

Paragraph 19: Deny.

Paragraph 20: Admit.

Paragraph 21: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 21 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 22: Deny.

Paragraph 23: Deny.

Paragraph 24: Deny.

Paragraph 25: Deny.

Paragraph 26: Deny.

Paragraph 27: Deny.

Paragraph 28: Deny.

Paragraph 29: Deny.

Paragraph 30: Deny.

Paragraph 31: Deny.

Paragraph 32: Deny.

Paragraph 33: The Defendant does not have knowledge or information sufficient to form a belief as to the truth of the Plaintiffs' allegation contained in Paragraph 33 of the Plaintiffs' Complaint and on that basis DENIES the allegations contained therein.

Paragraph 34: Deny.

Paragraph 35: Deny.

Defendant further DENIES the Plaintiffs' prayer for relief.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiffs' Complaint fails to state a claim on which relief may be granted.

Second Affirmative Defense

Plaintiffs' Complaint fails for reason that Plaintiffs, upon information and belief, are not registered with the Idaho Contractors Board as required by Idaho Code § 54-5204 *et seq.* and therefore, Plaintiff may not maintain the lien it has filed on the subject property.

Third Affirmative Defense

Plaintiffs' claims are barred in whole or in part by Plaintiff's failure to provide consideration for any alleged agreement with the Defendant.

Fourth Affirmative Defense

Plaintiffs' claim fails against Defendant for reason that the Plaintiff cannot provide a copy of any Agreement between itself and the Defendant and is therefore barred by the Statute of Frauds.

Fifth Affirmative Defense

Plaintiffs' claims are barred by the doctrine of unclean hands.

Sixth Affirmative Defense

Plaintiffs' claims are barred by the doctrines of waiver and/or estoppel.

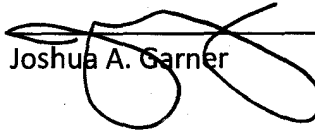
Defendant reserves the right to amend its Answer and Affirmative Defenses as additional information is acquired by the parties.

WHEREFORE, the Defendant prays for relief as follows:

1. That Plaintiff takes nothing by its Complaint;
2. That all claims against the Defendant contained in the Complaint be dismissed with prejudice and on the merits;
3. For an award of the Defendant's costs and reasonable attorney's fees incurred herein pursuant to Idaho Code 12-120, 12-121, and Idaho Rule of Civil Procedure 54 and any other applicable rule or statute; and
4. For such other and further relief as the Court deems just and proper.

DATED this 13 day of November, 2008.

THE LAW OFFICE OF JOSHUA A. GARNER, PLLC

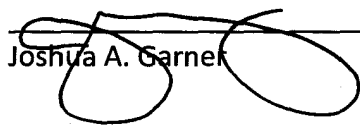

Joshua A. Garner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2008, I served a copy of the foregoing NOTICE OF APPEARANCE, on the following individuals by the method of delivery designated:

David A. Johnson
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405
(208) 523-4400

() U.S. Mail () Hand Delivered (☒) Facsimile


Joshua A. Garner

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

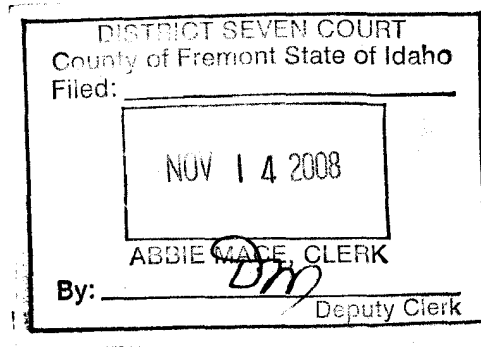
Case No: CV-08-469

NOTICE OF INTENT TO TAKE
DEFAULT

TO: DEFENDANT IDAHO TRADEMARK PROPERTIES, LLC

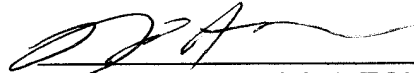
PLEASE TAKE NOTICE that, pursuant to Idaho Rules of Civil Procedure 55(a),
Plaintiffs Chris and Jill Magleby intend to take default against Defendant Idaho
Trademark Properties, LLC, on or after November 24, 2008, for the reason that no
answer or other responsive pleadings to Plaintiffs' Complaint have been filed by

1 - NOTICE OF INTENT TO TAKE DEFAULT



Defendant Idaho Trademark Properties, LLC. At that time, Plaintiffs will ask that judgment be entered without further notice.

DATED: November 13, 2008



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2008, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Gregory J. Ehardt
803 Pescadero
Idaho Falls, ID 83406


Mail

Jordan G. Garn
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Salt Lake City, UT 84111

Facsimile ~~801~~-363-0400

Joshua A. Garner
Garner Law Offices
24 South 1st West
Rexburg, ID 83440

5914
Facsimile 208-359-~~3181~~



David A. Johnson, Esq.

District Seven Court
County of Fremont
State of Idaho

Date: 11-18-08

Time: 4:13 pm

Abbie Mac, Clerk

Deputy Clerk: gm

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

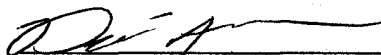
Defendants.

Case No: CV-08-469

NOTICE OF SERVICE

Pursuant to Idaho Rules of Civil Procedure 33 and 34, Plaintiffs' attorney David A. Johnson, hereby gives notice that on November 14, 2008, he served a true and correct copy of Interrogatories and Requests for Production of Documents to Defendant Jenks Brothers, Inc., and Idaho Trademark Properties, LLC, together with a copy of this Notice, by facsimile, on Joshua A. Garner, at his office in Rexburg, Idaho.

DATED: November 14, 2008



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

DOCUMENT
SCANNED

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2008, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

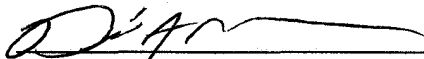
Jordan G. Garn
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
Salt Lake City, UT 84111

Joshua A. Garner
Garner Law Offices
24 South 1st West
Rexburg, ID 83440

Method of Service

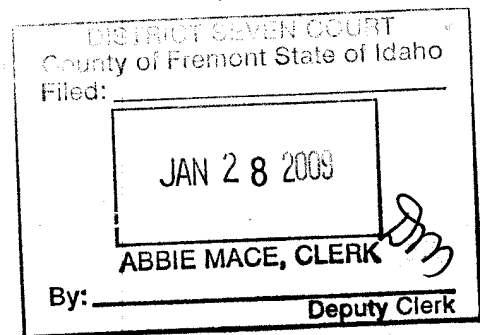
Facsimile 801-363-0400

Facsimile 208-359-5914



David A. Johnson, Esq.

Kent W. Gauchay
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000
I.S.B. #2709



Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No. CV-08-469

ANSWER AND CROSS-CLAIM

COMES NOW Defendants, Kevin and Tanya Garn, husband and wife, and separating
themselves from all other Defendants, admit, deny, and affirmatively allege as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against these Defendants upon which relief may be
granted.

SECOND DEFENSE

I. ANSWER AND CROSS-CLAIM

These Defendants deny each and every allegation contained in Plaintiff's Complaint unless specifically admitted herein.

THIRD DEFENSE

1. These Defendants are without sufficient knowledge or information to admit or deny the allegations contained in paragraph 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17 and 18 and therefore deny the same.

2. In response to paragraph 2, these Defendants admit the same.

3. In response to paragraph 13, these Defendants admit the same.

4. In response to paragraph 19, these Defendants admit, deny and replead as set forth above and incorporate the same herein by reference.

5. In response to paragraph 20, these Defendants admit the filing of a lien recorded as Instrument No. 515729; these Defendants deny that Plaintiff acted within statutory authority.

6. In response to paragraphs 21, 22 and 23, these Defendants deny the same.

7. In response to paragraph 24, these Defendants are without sufficient knowledge or information to admit or deny the allegations, and therefore deny the same.

8. In response to paragraph 25, these Defendants admit, deny and replead as set forth above and incorporate the same herein by reference.

9. In response to paragraphs 26, 27, 28, 29 and 30, these Defendants are without sufficient knowledge or information to admit or deny the allegations, and therefore deny the same.

10. In response to paragraph 31, these Defendants admit, deny and replead as set forth above and incorporate the same herein by reference.

11. In response to paragraphs 32, 33 and 34, these Defendants are without sufficient

2. ANSWER AND CROSS-CLAIM

knowledge or information to admit or deny the allegations and therefore deny the same.

12. In response to paragraph 35, these Defendants deny the same.

AFFIRMATIVE DEFENSES

1. These Defendants assert the affirmative defense of the accord and satisfaction.
2. These Defendants assert the affirmative defense of failure of consideration.
3. These Defendants assert the affirmative defense of payment.
4. These Defendants assert the affirmative defense of release.
5. These Defendants assert the affirmative defense of statute of frauds.
6. These Defendants assert the affirmative defense that the lien filed on or about March 10, 2008 was not timely filed.

ATTORNEYS FEES

These Defendants have been required to retain the legal services of the law firm of Simpson & Gauchay. Pursuant to Idaho Code § 12-120, 12-121 and I.R.C.P 54 these Defendants are entitled to an award of attorney's fees.

WHEREFORE, these Defendants, separating themselves from all other Defendants pray that Plaintiff's Complaint as it pertains to a cause of action against these Defendants be dismissed with prejudice and that these Defendants receive an award of attorney's fees.

CROSS CLAIM

FIRST CAUSE OF ACTION

COMES NOW Counterclaimants, Kevin Garn and Tanya Garn, husband and wife, and for cause of action against Cross-Defendants Idaho Trademark Properties, LLC and Jenks Brothers, Inc.

3. ANSWER AND CROSS-CLAIM

and Does 1-10 state, allege and plead as follows:

1. Kevin Garn and Tanya Garn are husband and wife and are residents of the State of Utah.
2. Cross-Defendant Idaho Trademark Properties, LLC is believed to be an Idaho limited liability company with it's principal place of business in Rexburg, Idaho.
3. Cross-Defendant Jenks Brothers, Inc. is believed to be an Idaho Corporation with it's principle place of business in Rexburg, Idaho.
4. Does 1-10 are unknown persons or entities who may be liable for damages as alleged herein. Once their actual identity is discovered, the proper name will be substituted.
5. On or about September 12, 2008, Chris and Jill Magleby, D.B.A. Selective Builders initiated legal action against Cross-Claimants and Cross-Defendants.
6. Chris and Jill Magleby, D.B.A. Selective Builders assert a claim against the named Defendants in the sum of \$23,250.00 plus costs and attorney's fees.
7. To the extent that Magleby's are successful in pursuit of their claim, and in the event a court should determine that Cross-Claimants have a monetary responsibility to Magleby's then the named Cross-Defendants should be responsible for any sums paid by
8. Cross-Claimants. Cross-Claimants are entitled to a monetary judgment against Cross-Defendants for an amount equal to, including costs and attorney's fees, that Cross-Claimants may be determined to be held liable to Magleby's.

SECOND CAUSE OF ACTION

9. Cross-Claimants re-allege paragraphs 1 - 8 above and incorporate the same herein as if set forth in full.

4. ANSWER AND CROSS-CLAIM

10. Cross-Defendants constructed a home on real property more particularly described as:
Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3, Fremont County, Idaho

11. In November 2007 Cross-Claimants purchased the home located on the above described property.

12. After purchasing the home, Cross-Claimants found that there were several defects in construction. Cross-Claimants requested that Cross-Defendants correct the construction defects and remedy the problems associated with the residence. Despite repeated requests for the construction defects to be corrected, and despite numerous promises from the Cross-Defendants that said work would be done, the work was not performed by the Cross-Defendants. As a result Cross-Claimants were required to correct construction defects by hiring other contractors to work on the subject property.

13. Cross-Defendants failure to construct the premises in a workmen like manner, and their failure to correct or cure the defects as requested by Cross-Claimants has resulted in Cross-Claimants suffering damages in an amount to be determined at the time of trial, but believed to be in excess of \$45,000.00.

14. Pursuant to Idaho Code § 12-120, 12-121 and I.R.C.P 54, Cross-Claimants are entitled to an award of attorney's fees and court costs from Cross-Defendants. In the event of default on this cross-claim, Cross-Claimants request an award of attorney's fees in the amount of \$7,500.00.

WHEREFORE, Cross-Claimants pray for judgment, order and relief against Cross-Defendants as follows:

1. For a judgment in favor of Cross-Claimants for any amount in which it is determined

5. ANSWER AND CROSS-CLAIM

that Cross-Claimants owe Magleby's as set forth in Magleby's Complaint on file herein.

2. For judgment against Cross-Defendants in an amount to be proven at trial, but believed to be in excess of \$45,000.00 to remedy construction defects and failure to cure said defects.

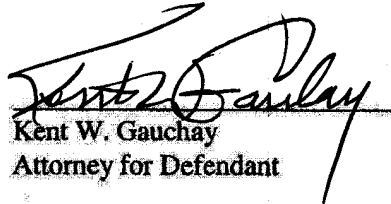
3. For an award of attorneys fees, which in the event of default on this Cross-Claim should be the sum of \$7,500.00.

4. For costs of suit incurred herein.

5. For such other and further relief as the Court may deem appropriate.

DATED this 26th day of January, 2009.

SIMPSON & GAUCHAY


Kent W. Gauchay
Attorney for Defendant

6. ANSWER AND CROSS-CLAIM

VERIFICATION

STATE OF UTAH)

)ss.

County of Davis)

I, Kevin Garn and Tanya Garn, being first duly sworn, on my oath, depose and state:

That I am one of the Defendants in the foregoing action, and that I have read the above document, know the contents thereof, and that the same is true as I verily believe.


Kevin Garn

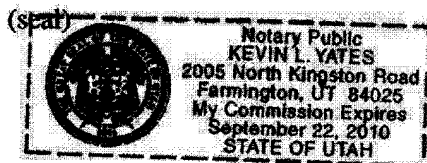

Tanya Garn

SUBSCRIBED AND SWORN To before me this 22nd day of January, 2009.


Notary Public of Utah

Residing at:

My Commission Expires:



7. ANSWER AND CROSS-CLAIM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 26th day of January, 2009, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

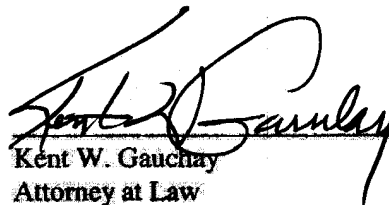
DOCUMENT SERVED: ANSWER AND CROSS CLAIM

PERSON SERVED: David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment PLLC
477 Shoup Avenue, Ste. 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251

Gregory J. Ehardt
803 Pescadero
Idaho Falls, Idaho 83406

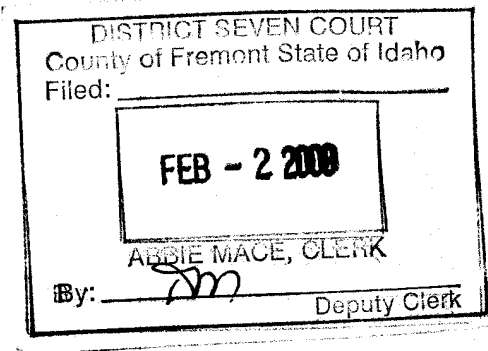
Joshua A. Garner
Garner Law Office
24 South 1st West
Rexburg, Idaho 83440

☐ Hand Delivered
☒ Mail
☐ Fax


Kent W. Gauchay
Attorney at Law

8. ANSWER AND CROSS-CLAIM

Kent W. Gauchay
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000
I.S.B. #2709



Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MIGLEBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.


Case No. CV-08-469

NOTICE OF APPEARANCE

COMES NOW the law firm of Simpson & Gauchay and hereby enters an appearance on
behalf of Kevin Garn and Tanya Garn, husband and wife only.

DATED this 29th day of January, 2009.

SIMPSON & GAUCHAY


Kent W. Gauchay
Attorney for Defendants, Kevin and Tanya Garn

1. NOTICE OF APPEARANCE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 29 day of January, 2009, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

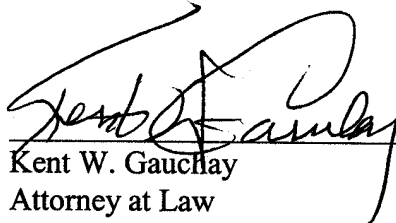
DOCUMENT SERVED: NOTICE OF APPEARANCE

PERSON SERVED: David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment PLLC
477 Shoup Avenue, Ste. 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251

Gregory J. Ehardt
803 Pescadero
Idaho Falls, Idaho 83406


Joshua A. Garner
Garner Law Offices
24 South 1st West
Rexburg, Idaho 83440

☐ Hand Delivered
☒ Mail
☐ Fax


Kent W. Gauchay
Attorney at Law

2. NOTICE OF APPEARANCE

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

DISTRICT COURT Fremont State of Idaho	
Filed:	
FEB - 2 2009	
ABBIE MACE, CLERK	
By: 	Deputy Clerk

Attorney for Defendants, Jenks Brothers, Inc., and
Idaho Trademark Properties, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

NOTICE OF SERVICE

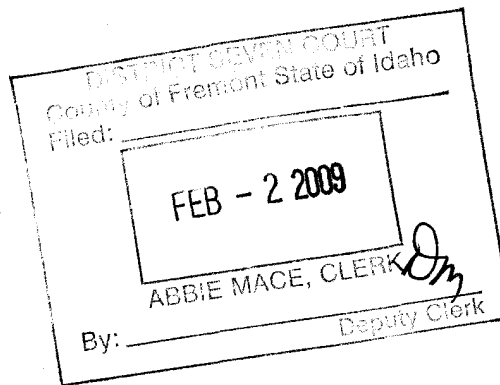
I hereby certify that on this 02 day of February, 2009, I served "Defendants' First Set of Interrogatories and Request for Production of Documents" upon the individual listed below through facsimile delivery.

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

Dated this 02 day of February, 2009.


Joshua A. Garner

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420



Attorney for Defendants, Jenks Brothers, Inc., and
Idaho Trademark Properties, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

DEFENDANTS' FIRST SET OF
INTERROGATORIES, AND PRODUCTION
OF DOCUMENTS TO PLAINTIFF

TO: PLAINTIFF CHRIS AND JILL MAGELBY, D/B/A SELECTIVE BUILDERS AND THEIR ATTORNEY OF
RECORD, DAVID A JOHNSON, ESQ.

PLEASE TAKE NOTE that Defendants JENKS BROTHERS, INC., and IDAHO TRADEMARK
PROPERTIES, LLC., request Plaintiffs CHRIS AND JILL MAGELBY D/B/A SELECTIVE BUILDERS to answer the
following Interrogatories within thirty (30) days from the date of service herein, pursuant to Idaho Rules
of Civil Procedure 33, and to respond to the following Requests for Production within thirty (30) days
from the date of service herein, pursuant to Idaho Rules of Civil Procedure 34.

INTERROGATORIES
INSTRUCTIONS AND DEFINITIONS

The following terms, words and phrases shall have the following meaning in this discovery pleading.

1. The term "you" and "your" refers to the individual answering the interrogatory and all agents, employees, representatives (including insurers), investors, consultants and attorneys of the answering party.
2. The term "document" shall mean any kind of written, printed, typed, graphic or photographic matter of any kind or nature, however produced or reproduced, and all mechanical and electronic sound recordings and written transcripts thereof, however produced or reproduced whether in your control or not, and including without limitation, originals, all file copies, all other copies no matter how and by whom prepared and all drafts of such documents whether used or not.
3. The term "identify", when used with respect to a document, or the description or identification of a document, shall be deemed to request the nature and substance of the document with sufficient particularity to enable the same to be precisely identified, including the date, if any, which the document bears, the names of all persons authorizing the document, and the name and address of the custodian(s) of the original or, if none, a legible copy of the documents.
4. The term "identify" when used with respect to a person, shall be deemed to request the person's full name, the person's last known business address (if a natural person), the person's last known address, and the person's business and resident telephone number.
5. The term "identify" when used with respect to oral communications, shall be deemed to request, whether said communication was in person or by telephone an identification (as provided in definition 4) of each person who participated in or heard any part of said communication and the substance of what was said by each person who participated in said communication.
6. These interrogatories are continuing in character so as to require you to file supplementary answers in a seasonal manner if you obtain further or different information before trial.
7. Where knowledge or information in possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within

your dominion, or available to you, regardless of whether this information is in your personal possession, or is possessed by your agent, attorneys, servants, employees, independent contractors, representatives, insurers or others with whom you have a relationship or from whom you are capable of deriving information, documents or material.

8. Each interrogatory shall be accorded a separate answer and each subpart of an interrogatory shall be accorded a separate answer,

INTERROGATORIES

INTERROGATORY NO. 1: WITNESSES. State the name, address and telephone number of each person you intend to call as a witness at the trial of this matter. With regard to each witness, please provide the substance of the facts to which you expect the witness to testify.

INTERROGATORY NO. 2: EXPERT WITNESSES. Separately identify each person whom you intend to call as an expert witness at the trial of this action and state the subject matter on which such expert witness is expected to testify, the substance of the facts to which such expert witness is expected to testify, and the substance of the opinions to which such expert is expected to testify.

INTERROGATORY NO. 3: COMMUNICATION. Please describe all communications, including all conversations, letters, memorandums, emails, and negotiations between you and the Defendants, Jenks Brothers, Inc., and Idaho Trademark Properties, LLC.

INTERROGATORY NO. 4: EXHIBITS. Please list and identify all exhibits which you intend or expect to introduce into evidence at any hearing or trial of this matter and state the name and address of the person presently in possession of such exhibits.

INTERROGATORY NO. 5: SCOPE OF SERVICES. Please describe in detail each and every service provided by Chris Magleby and/or Jill Magleby as Selective Builders at 3635 Redtail Street, Island Park, Idaho.

INTERROGATORY NO. 6: PARAGRAPH 10 OF PLAINTIFF'S COMPLAINT. Please describe in detail the allegation made by Plaintiffs in paragraph 10 of Plaintiff's Complaint with regard to any agreement by Jenks Brothers, Inc., and the Plaintiffs to exchange 1.5% of the sales price in exchange for services by the Plaintiffs. Additionally, please identify the individuals present when this alleged agreement was made, the place where the alleged agreement was made, and the date when the alleged agreement was made.

INTERROGATORY NO. 7: TIME OF SERVICES. Please identify the date when Plaintiffs began performing services at 3635 Redtail Street, Island Park, Idaho. Additionally, please identify each date that the Plaintiffs provided services at the property described herein.

INTERROGATORY NO. 8: AGREEMENTS. Please identify and agreement or understandings you had between yourself and Kevin Garn and/or Tanya Garn.

INTERROGATORY NO. 9: SALE. Please describe any and all services you provided to Kevin Garn and/or Tanya Garn after the sale of the property located at 3635 Redtail Street, Island Park, Idaho.

INTERROGATORY NO. 10: PARAGRAPH 14 OF PLAINTIFF'S COMPLAINT. Please describe how you determined the amount of \$23,250.00 as the value of services provided to the property located at 3635 Redtail Street, Island Park, Idaho.

INTERROGATORY NO. 11: REGISTRATION. Please describe whether the Plaintiffs are currently registered with the Idaho Contractor's Board or were registered with the Idaho Contractor's Board at the time it performed services at 3635 Redtail Street, Island Park, Idaho.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: A copy of all documents and potential exhibits which may be introduced by Plaintiffs at a hearing or trial of this matter.

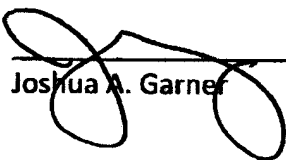
REQUEST NO. 2: A copy of all communications between Plaintiffs and Defendants.

REQUEST NO. 3: A copy of all bids, contracts, invoices, or the like sent by Plaintiffs to Defendants.

REQUEST NO. 4: A copy of all construction documents in your possession related to the following property: 3635 Redtail Street, Island Park, Idaho

REQUEST NO. 5: A copy of all documents you relied on in answering the foregoing interrogatories, to the extent the documents are not protected by privilege, including work-product and/or attorney-client privilege.

Dated this 02 day of Feb, 2009



Joshua A. Garner

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Rexburg, Idaho; that on the 02 day of February, 2009, I caused a true and correct copy of the foregoing **DEFENDANTS' FIRST SET OF INTERROGATOIRES, REQUEST FOR ADMISSION, AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS TO PLAINTIFF** to be served upon the following persons at the addresses below their names either by depositing said documents in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

Dated this 02 day of January, 2009.

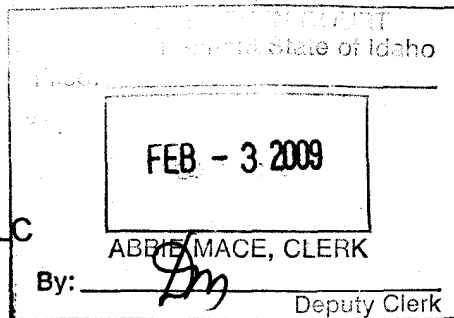

Joshua A. Garner**PERSON**

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

SERVICE

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile to: (208) 523-4400
☐ Overnight Mail

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

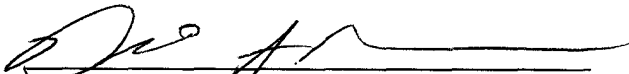
Defendants.

Case No: CV-08-469

NOTICE OF SERVICE

David A. Johnson, attorney for Chris and Jill Magleby in the above-entitled matter, hereby gives notice that on January 30, 2009, Plaintiff's Interrogatories and Request for Production of Documents to Defendants Kevin and Tanya Garn, together with a copy of this notice was served by hand delivery on Kent W. Gauchay, Simpson & Gauchay, 497 N. Capital Avenue, Suite 200, Idaho Falls, Idaho 83402.

DATED: January 30, 2009


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January 30, 2009, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Persons/Attorney Served:

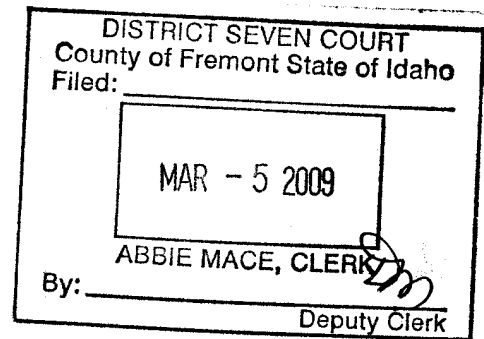
Kent W. Gauchay
Simpson & Gauchay
497 N. Capital Ave., Suite 200
PO Box 50484
Idaho Falls, ID 83405-0484

Method of Service:

Hand Delivered


David A. Johnson, Esq.

Kent W. Gauchay
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000
I.S.B. #2709



Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No. CV-08-469

**ORDER EXTENDING DATE
FOR DISCOVERY**

The court having considered Defendant, Kevin and Tanya Garn's, Motion Extending Date
for Discovery and good cause appearing;

IT IS HEREBY ORDERED that the due date for discovery shall be extended and due on
March 23, 2009.

DATED this 10 day of March, 2009.

Judge



1. ORDER EXTENDING DATE FOR DISCOVERY

NOTICE OF ENTRY

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Order to the persons listed below, prepaying the postage thereon this 10 day of March, 2009

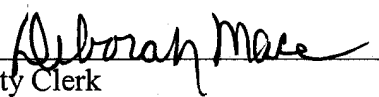
David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment PLLC
477 Shoup Avenue, Ste. 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251

Kent W. Gauchay, Esq.
Simpson & Gauchay
P. O. Box 50484
Idaho Falls, Idaho 83405

Gregory J. Ehardt
803 Pescadero
Idaho Falls, Idaho 83406

Joshua A. Garner
Garner Law Office
24 South 1st West
Rexburg, Idaho 83440

Clerk of the Court


Deputy Clerk

2. ORDER EXTENDING DATE FOR DISCOVERY

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**


Defendants.

Case No: CV-08-469

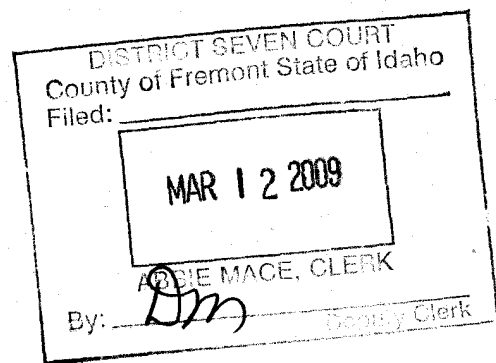
**AMENDED NOTICE OF
COMPLIANCE**

I HEREBY CERTIFY that Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff were hand delivered together with a copy of this Notice, upon Kent Gauchay, Simpson & Gauchay, 497 N. Capital Ave., Suite 200, Idaho Falls, Idaho, attorney for the Defendant.

DATED: March 6, 2009


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

DOCUMENT
SCANNED



CERTIFICATE OF SERVICE

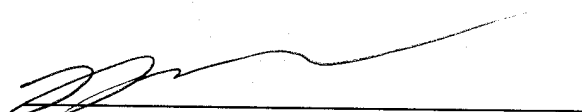
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 9, 2009, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Persons/Attorney Served:

Kent W. Gauchay
Simpson & Gauchay
497 N. Capital Ave., Suite 200
P.O. Box 50484
Idaho Falls, ID 83405-0484

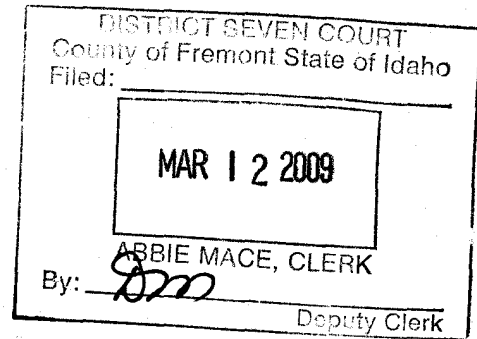
Method of Service:

Fax: 522-4295



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

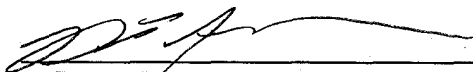
Defendants.

Case No: CV-08-469

NOTICE OF COMPLIANCE

I HEREBY CERTIFY that Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents were hand delivered together with a copy of this Notice, upon Laurie Baird Gaffney, Gaffney Law Office, 591 Park Avenue, Suite 302, Idaho Falls, Idaho, attorney for the Defendant.

DATED: March 6, 2009


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

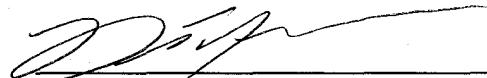
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 6, 2009, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Persons/Attorney Served:

Kent W. Gauchay
Simpson & Gauchay
497 N. Capital Ave., Suite 200
P.O. Box 50484
Idaho Falls, ID 83405-0484

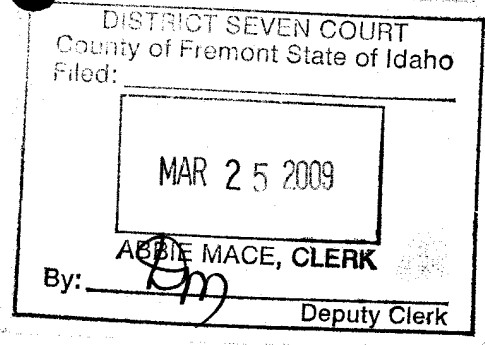
Method of Service:

Hand Delivery



David A. Johnson, Esq.

Kent W. Gauchay
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000
I.S.B. #2709



Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs, . . .

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No. CV-08-469

NOTICE OF SERVICE

NOTICE IS HEREBY GIVEN that on the 23rd day of March, 2009, a copy of Answers to Plaintiff's Interrogatories and Request for Production of Documents to Defendant's Garns was mailed, along with a copy of this Notice, upon:

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment PLLC
477 Shoup Avenue, Ste. 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251

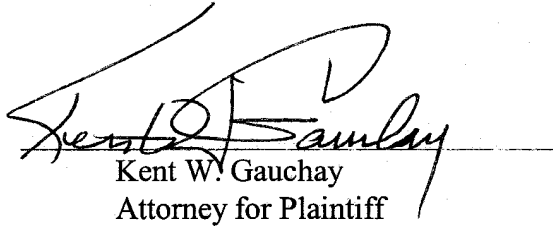
1. NOTICE OF SERVICE

DOCUMENT
SCANNED

Gregory J. Ehardt
803 Pescadero
Idaho Falls, Idaho 83406

Joshua A. Garner
Garner Law Office
24 South 1st West
Rexburg, Idaho 83440

DATED this 23 day of March, 2009.



Kent W. Gauchay
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 23 day of March, 2009, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

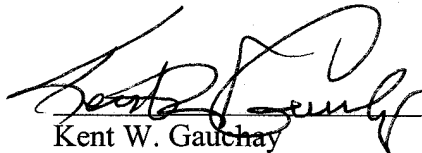
DOCUMENT SERVED: **NOTICE OF SERVICE**

PERSON SERVED: David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment PLLC
477 Shoup Avenue, Ste. 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251

Gregory J. Ehardt
803 Pescadero
Idaho Falls, Idaho 83406

Joshua A. Garner
Garner Law Office
24 South 1st West
Rexburg, Idaho 83440

☐ Hand Delivered
☒ Mail
☐ Fax


Kent W. Gauchay
Attorney at Law

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

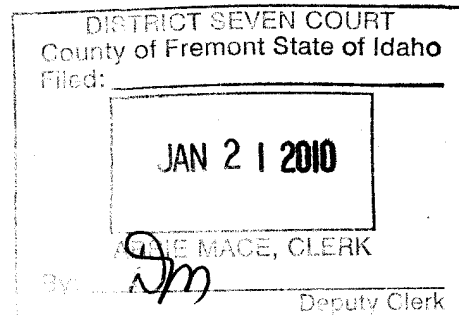
**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

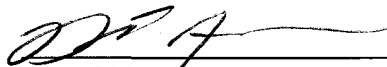


Case No: CV-08-469

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named Plaintiffs will call up for hearing their Motion for Partial Summary Judgment on February 23, 2010, at the hour of 2:30 p.m., before the Honorable Gregory W. Moeller, at the Fremont County Courthouse, St. Anthony, Idaho.

DATED: January 20, 2010


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January 20, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Persons/Attorney Served:

Joshua A. Garner, PLLC
24 S. 1st West
Rexburg, ID 83440

Kent W. Gauchay
Simpson & Gauchay
497 N. Capital Ave., Suite 200
P.O. Box 50484
Idaho Falls, ID 83405-0484

Method of Service:

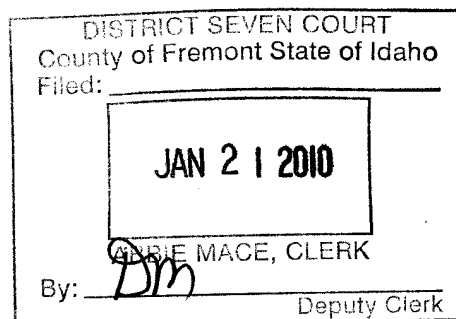
Mail

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,**

Defendants.

Case No: CV-08-469

**AFFIDAVIT OF JILL MAGLEBY IN
SUPPORT OF PARTIAL SUMMARY
JUDGMENT**

STATE OF IDAHO)
 : ss.
County of Bonneville)

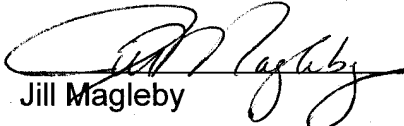
Jill Magleby, being first duly sworn, deposes and says:

1. I am one of the Plaintiffs in this matter and I am entirely familiar with the facts and circumstances herein.
2. I am married to Chris Magleby (Chris) and we are residents of Bonneville County, Idaho.

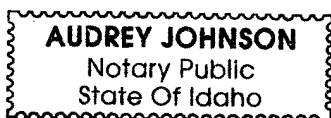
1 - AFFIDAVIT OF JILL MAGLEBY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT


3. Chris and I have a construction business known as Selective Builders. I am involved in the interior decorating part of the business, including the selection of materials as approved by the persons we are working for or designated as the persons who will be the eventual owners of the property.
4. While working with Chris on the property located at 3635 Redtail Street, Island Park, Idaho (Subject Property), Brandon Jenks, Tony Jenks and Brady Gardner approached Chris and me and stated that they had fired the current interior designer. I was asked to act as an interior decorator to provide decorating for the property located at 3635 Redtail Street, Island Park, Idaho. I was also told that I would be paid one-half of one percent (0.5%) of the gross sales price for the home. I agreed to enter into the contract.
5. I performed the services that I agreed to do. In doing so, I had frequent conversations with Tanya Garn in the selection of materials that would be used in the construction and decorating of this home. On one occasion I drove to Utah to consult with Tanya Garn and get her approval on various materials.
6. I am unaware of being paid for any of my services or those of my husband. I keep the records for our business and I know that we have not been paid.

DATED: January 19, 2010.


Jill Magleby

SUBSCRIBED AND SWORN to before me on January 19, 2010




Notary Public for Idaho
Commission expires: 3-10-15

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January ²⁰~~19~~, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name & Address

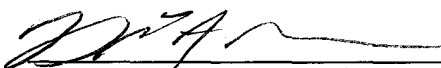
Joshua A. Garner, PLLC
24 S. 1st West
Rexburg, ID 83440

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

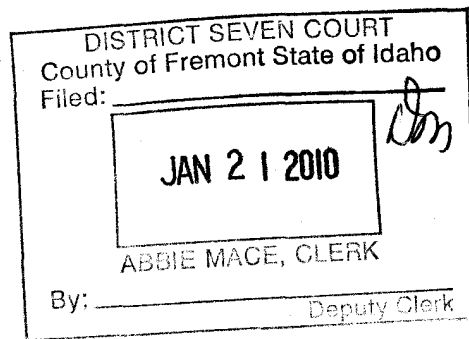
Method of Service

Mail

Mail


David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,**

Defendants.

Case No: CV-08-469

**AFFIDAVIT OF CHRIS MAGLEBY IN
SUPPORT OF PARTIAL SUMMARY
JUDGMENT**

STATE OF IDAHO)
 : ss.
County of Bonneville)

Chris Magleby, being first duly sworn, deposes and says:

1. I am one of the Plaintiffs in this matter and I am entirely familiar with the facts and circumstances herein.
2. I am married to Jill Magleby (Jill) and we are residents of Bonneville County, Idaho.

1 - AFFIDAVIT OF CHRIS MAGLEBY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

3. Jill and I have a construction business known as Selective Builders. As part of our services we are involved in the actual construction of projects and also supervise other construction. Jill is involved in the interior decorating part of the business, including the selection of materials as approved by the persons we are working for or designated as the persons who will be the eventual owners of the property.
4. Prior to June 2007, I have known and worked with persons associated with Idaho Trademark Properties, LLC, (ITP) and Jenks Brothers, Inc. (Jenks), including Brady Gardner, Mike Ferguson, Chris Ferguson, Brandon Jenks and Tony Jenks. I have known them socially as well.
5. ITP and Jenks shared common office space in Rexburg, Idaho. In July 2007, while doing business in this office related to other properties I was working with, I was told that ITP was the owner of real property located in Island Park (later identified as the property located at 3635 Redtail Street, Island Park, Idaho) hereinafter referred to as the "Subject Property."
6. While working on another job, I was approached by Brandon Jenks and asked to manage the Island Park project from the drywall installation to the completion of the project. They requested that I attend weekly meetings with Jenks and Lori Fife to discuss progress, budget, and job site needs. The first meetings were held at the ITP office followed by a trip to job sites. During these meetings and trips, the agreement was made that I would manage the job site work for the interior of the home while Logan Miller would continue the management of construction on the

exterior and through the sheet rock phase. Lori Fife was to manage the interior design and ordering of materials needed. I agreed to allow ITP to purchase supplies on their business account as needed to ensure the lowest prices. At this time I was also helping in the management of other projects for the Jenks. Their agreement on those projects was one percent (1%) of the sales price of the property above and beyond his business services. In exchange for my management time they told me that they would pay me one percent (1%) of the gross sales price when the property at 3635 Redtail Street was sold. I agreed.

7. A short time later (near July 25, 2007), Brady Gardner and the Jenks called and told me that they were not happy with the interior decorator for the Subject Property. They asked if Jill would be willing to provide the interior decorating for the property as well as be the liaison between ITP and the future home owners of the Subject Property, and also do work on future homes in the Victor, Idaho area. She was to assume the duties of Lori Fife immediately. Because I was managing the interior, Jill agreed to help. I worked closely with Jenks on construction and Jill worked closely with ITP and the Garns for the interior decorating needs. The agreement between ITP and Lori Fife in exchange for her time and labor, was one dollar (\$1) per square foot of the home living space. Because of the close relationship between myself, Jenks and ITP the agreement was made that Jill would render services for one-half of one percent (0.5%). We agreed

to the same. In total, Jill and I were to receive one and one-half percent (1.5%) of the gross sales price for the Subject Property.

8. Jill and I performed what we needed to do as per the agreement with ITP and Jenks. Part of our work was to install various materials and fixtures to the Subject Property, manage subcontractors, consult regularly with Kevin and Tanya Garn, paint, tile, decorate as per the requests of Garns, carpeting, and installing hardwood floors. Jill and I requested a small payment from ITP around the first of October to help offset some of the expenses incurred from management. We had also taken on more responsibilities with managing the exterior siding and jobsite clean up that were not part of our original agreement. Logan Miller who was helping with the construction of the exterior, had been moved to another project and left me to attend to his duties. Brady Gardner from ITP telephoned me and said that there was not enough extra money at that point to pay Jill and me until the closing of the Subject Property. The original closing date was scheduled for mid October of 2007. Brady asked if I could wait until closing in a few weeks for payment. I agreed so that it didn't put ITP in a bind. There were also other subcontractors that had not been paid that I had hired through my personal business and I wanted any extra money put towards their outstanding invoices. I worked to complete all tasks on the interior and exterior to ensure closing, but the closing date was pushed back. I became frustrated with the lack of payment to myself and other subcontractors whose invoices were more than thirty (30) days

old. I threatened to leave the project and stall all work involved on the interior and exterior. Brandon Jenks left his hunting trip to make a personal trip to the job site to visit with me and discuss the problems with money. Brandon and I went over the major outstanding bills, including the management fees for both myself and Jill. Brandon agreed once again on the original terms set for the management and interior decorating work and ensured me that I would be well taken care of as soon as the property closed. I agreed to push hard and to complete the work. The home was to close as soon as the exterior work could be done as per bank requirements to process the loan. Jill and I finished the few remaining items necessary for the bank to finance the same on December 13, 2007. There were a few remaining items left to be completed in the spring when weather permitted.

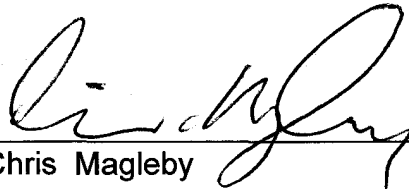
9. ITP sold the Subject Property to Garns on December 11, 2007, for \$1,550,000.00, which was paid by an exchange of property and with money. Thereafter we requested to be paid for our services, but no one was willing to pay for the same. Upon the closing of the home it was a fight for myself and Jill to get ITP to pay final amounts to all contractors, which still to this day have not been paid. In the final sale of the Subject Property, there was a trade of the lot next door to the Subject Property owned by the Garns. Because the property was traded to ITP as part of the final sale, there was not enough cash at closing to settle all debts incurred due to the construction of property.

10. Brandon Jenks told me in early February of 2008, that ITP and all involved in the construction of the Subject Property were going to split ways but that we would be paid upon their settlement. Jill and I spent many hours trying to resolve the matter with different members of ITP. As time went on, the communication between all parties stopped and everyone went their separate ways leaving Jill and I with no payment. At that time Jill and I were left responsible to pay other subcontractors that we had hired through our personal business and assume debt unpaid by ITP.
11. After not getting paid, we contacted Mr. Johnson, our present attorney, to file a Claim of Lien on our behalf. A Claim of Lien was filed on the records of Fremont County, Idaho on March 10, 2008 under Instrument Number 515729.
12. During the winter of 2007-2008 the Subject Property was damaged by weather conditions. I felt an obligation to the Subject Property and made frequent stops to the home during the winter to ensure its safety. I made a trip to the Subject Property to plow snow that was over five feet deep in the driveway so that natural gas could be delivered to ensure the heat remained on in the home. During this trip I found water damage on all three levels of the home caused by improper framing and roofing materials. I made an effort to contact all parties involved to make them aware of the severe damage. I was hired to make the repairs, which I did, and was compensated by an insurance company in the amount of the cost of repairs. The work and the repairs were substantially completed in

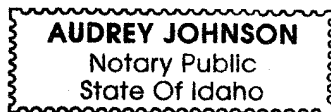
July 2008. During this time I also helped in completing the tasks that Jenks failed to complete upon closing as requested by the Garns.


13. The value of the services, materials and labors Jill and I provided are in excess of \$23,250.00.

DATED: January 19, 2010.


Chris Magleby

SUBSCRIBED AND SWORN to before me on January 19, 2010.




Notary Public for Idaho
Commission expires: 3-10-15

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January ~~19~~²⁰, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name & Address


Joshua A. Garner, PLLC
24 S. 1st West
Rexburg, ID 83440

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Method of Service

Mail

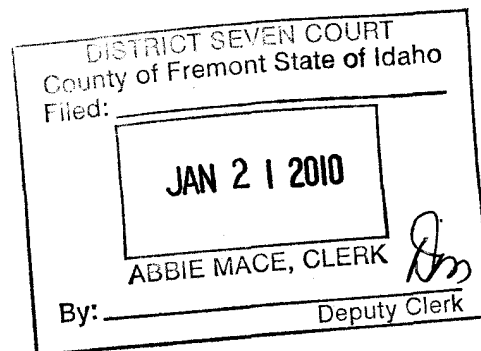
Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,**

Defendants.

Case No: CV-08-469

**PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

David A. Johnson, on behalf of the Plaintiffs, Chris Magleby and Jill Magleby (Maglebys), hereby moves the Court for its order granting summary judgment to Maglebys related to the First Cause of Action (Materialman's Lien) and the Second Cause of Action (Contract).

This Motion is brought pursuant to IRCP 56(a) and is supported by the Affidavits of Chris Magleby and Jill Magleby.

1- MAGLEBYS' MOTION FOR PARTIAL SUMMARY JUDGMENT (WITH MEMORANDUM)

STATEMENT OF FACTS

The undisputed facts of this case are:

1. Maglebys are residents of Bonneville County, Idaho, and are involved in the construction industry in the Eastern Idaho area.
2. Defendants, Kevin and Tanya Garn (Garns), are residents of the State of Utah, but own the real property which is the subject of this litigation.
3. Defendant, Idaho Trademark Properties, LLC, (ITP), is an Idaho limited liability company with its principal place of business in Rexburg, Idaho. ITP owned the subject real property prior to selling the same to Garns.
4. Jenks Brothers, Inc. (Jenks) is an Idaho corporation with its principal place of business in Rexburg, Idaho. Jenks was the general contractor for the subject real property.
5. The managers of ITP, at all relevant times to this litigation, consisted of Brady Gardner, Chris Ferguson and Michael Ferguson.
6. The officers, managers, and/or owners of Jenks, at all relevant times to this litigation, were Tony Jenks and Brandon Jenks.
7. ITP and Jenks shared office space in Rexburg, Idaho.
8. In or about July 2007, ITP was the owner of real property located at 3635 Redtail Street, Island Park, Idaho (Subject Property), more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1,
Division 3, Fremont County, Idaho.

9. In or about July 2007, Brandon Jenks and Tony Jenks approached Maglebys and requested their services, labor, and skills, in the construction of the improvements on the Subject Property.
10. In July 2007 the Jenks also requested that the Maglebys manage the project from the installation of the sheet rock to the completion of the project. Upon the firing of Lori Fife, the original project interior decorator, Jill was asked by Jenks and Brady Gardner to act as the interior designer.
11. Jenks promised that in exchange for their services, Maglebys would receive one and one-half percent (1.5%) of the sales price of the Subject Property. One percent (1%) was to be compensation for management of the project and one-half of one percent (0.5%) for the interior designing of the same.
12. Maglebys agreed to the arrangements and thereafter performed various services on the Subject Property and installed various materials to the Subject Property. The services provided included management of subcontractors, acting as a liaison/contact person between ITP and Garns, painting, tiling, interior decorating, carpeting, and installing hardwood floors.
13. A Claim of Lien was filed by Maglebys on the records of Fremont County, Idaho on March 10, 2008 under instrument number 515729.
14. Maglebys sent a copy of the Claim of Lien to Garns by certified mail on March 11, 2008.
15. During the winter of 2007-2008 the Subject Property was damaged. Maglebys were hired to make the repairs. Maglebys made the repairs and were compensated by an insurance company in the amount of the cost of repairs.

The work was substantially completed in July 2008, including follow-up repair work.

16. ITP sold the Subject Property to Garns in November 2007, for \$1,550,000.00. The purchase price was paid by using a combination of money and a transfer of a lot in the same subdivision.
17. Based upon the parties' agreement, Maglebys furnished materials and labor to the Subject Property having a value in excess of \$23,250.00.
18. After the allowance of all just and lawful offsets, payments, and credits to Defendants, there remains a balance of \$23,250.00 due and unpaid.
19. The materials installed on the Subject Property have substantial value, which value is in excess of \$23,250.00. This value is established in terms of the value of the services and materials and in the increase in value of the Subject Property.

DISCUSSION

Standard.

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact. This burden can be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show that there is indeed a genuine issue for trial. *Boots ex rel. Boots v. Winters*, 179 P.3d 352, 355 (Ct. App. 2008).

First Cause of Action - Lien Foreclosure.

In July 2007, Maglebys were requested to provide services and materials in the construction of the cabin on the Subject Property. The persons who asked for these services were Brandon Jenks and Tony Jenks (collectively referred to as "Jenks"). At the time of entering into this contract, Jenks were both managers of Idaho Trademark Properties (ITP), the owners of the Subject Property, and the owners of Jenks Brothers, Inc., the general contractor for the construction of the cabin on the Subject Property.

Maglebys' authority to file upon a lien against the subject real property is found in Idaho Code §45-501 which reads:

Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any . . . other structure, or who . . . estimates of cost, on-site observation or supervision, or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, or to establish boundaries, has a lien upon the same for the work or labor done or professional services or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: . .

Maglebys squarely fall within the parameters of this statutory scheme. Further, Maglebys complied with all necessary procedural requirements, including timely recording a claim of lien and stating the correct information in compliance with Idaho Code §45-507. Subsequently a copy of the Claim of Lien was timely and properly sent to the Garns. When the obligation was not paid, the present foreclosure process was filed within six months (Idaho Code §45-510.)

Jenks had the authority to hire Maglebys, as the statutory agents and Brady Gardner was a member and manage of ITP. As the general contractor for the Subject

5- MAGLEBYS' MOTION FOR PARTIAL SUMMARY JUDGMENT (WITH MEMORANDUM)

Property, pursuant to Idaho Code §45-501, a contractor is an agent of the owner for purposes of the lien statute.

The amount due and owing is also easy to calculate since the same was contingent upon the value of the property and is the customary rate for the services and materials provided by Maglebys.

Second Cause of Action - Contract.

The Defendants, (minus Garns), hired Maglebys to do the work as indicated above. Maglebys did as they were asked to do and are entitled to summary judgment pursuant to the contract between the parties.

Idaho law requires that before a contract is enforceable, there must be a meeting of the minds as to the terms of the contract before the contract is formed. "Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties. *Thomas v. Schmelzer*, 118 Idaho 353, 356, 796 P.2d 1026, 1029 (Ct. App.1990)." *Potts Const. Co. v. North Kootenai Water Dist.* 141 Idaho 678, 681, 116 P.3d 8, 11 (Idaho, 2005). There was a meeting of the minds between Magleby, ITD and Jenks Brothers, Inc.

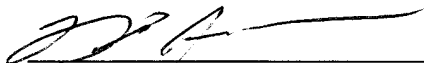
Attorney Fees

Maglebys are entitled to attorney fees and costs against ITP and Jenks because the same is a commercial transaction. (Idaho Code §12-120(3)). Attorney fees should be awarded Maglebys as to the lien foreclosure pursuant to Idaho Code §45-513.

Conclusion

For the reasons stated above, Maglebys are entitled to summary judgment, both as to the lien foreclosure against the property and a monetary judgment as to the Defendants Idaho Trademark Properties, LLC, and Jenks Brothers, Inc.

DATED: January 20, 2010



WRIGHT, JOHNSON TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

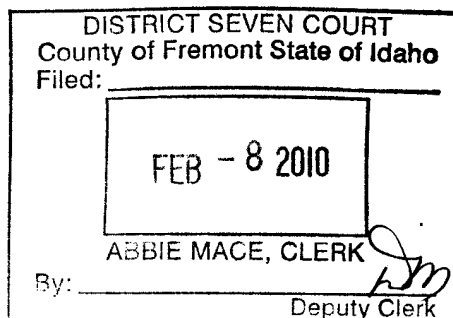
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January 20, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name & Address	Method of Service
Joshua A. Garner, PLLC 24 S. 1 st West Rexburg, ID 83440	Mail
Kent W. Gauchay Simpson & Gauchay PO Box 50484 Idaho Falls, ID 83405-0484	Mail



David A. Johnson, Esq.

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420



Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

DEFENDANTS' BRIEF IN RESPONSE
TO PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

COMES NOW, Defendants, Jenks Brothers, Inc., and Idaho Trademark Properties, LLC, by and through its attorney of record, Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC, and pursuant to I.R.C.P. 56(a) and (c) responds to Plaintiff's Motion for Summary Judgment as follows:

STATEMENT OF FACTS

1. Upon information and belief, Maglebys are residents of Bonneville County, Idaho.
2. Upon information and belief, Kevin and Tanya Garn are residents of the State of Utah, and they are the owners of the real property which is located at 3635 Redtail Street, Island Park, Idaho, which is the subject property of this matter.

3. Defendant, Idaho Trademark Properties, LLC, is an Idaho limited liability company with its principal place of business in Rexburg, Idaho.
4. Jenks Brothers, Inc., is an Idaho corporation with its principal place of business in Rexburg, Idaho.
5. The managers of ITP, at all relevant times of this litigation, were Brady Gardner, Chris Ferguson, Michael Ferguson, Brandon Jenks, and Tony Jenks.
6. The officers, managers, and/or owners of Jenks Brothers, Inc., at all relevant times to this litigation, were Tony Jenks and Brandon Jenks.
7. In or about July 2007, ITP was the owner of the real property located at 3635 Redtail Street, Island Park, Idaho.
8. At the request of ITP, Jenks Brothers, Inc., acted as the general contractor for the building of a house located at 3635 Redtail Street, Island Park, Idaho, which is the subject property of this matter.
9. Jenks Brothers, Inc., on behalf of Idaho Trademark Properties, LLC, requested the services of Chris Magleby. Chris provided services to the subject property. However, at no time was there a contract signed or an agreement entered into regarding what Chris would be paid for his services.
10. With respect to Jill Magleby, she was never hired by either Jenks Brothers, Inc., or Idaho Trademark Properties, LLC.

ISSUES OF LAW AND ARGUMENT

On a motion for summary judgment, all factual inferences are drawn in favor of the nonmoving party. *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986). On a motion for summary judgment, all facts and inferences must be drawn in favor of the nonmoving party, and summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Thompson v. City of Idaho Falls*, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994). When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party, thus, it follows that if the moving party fails to challenge an element of the

nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant. *See Thompson v. City of Idaho Falls*, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994).

In the case at bar, the Defendants can demonstrate that genuine issues of material fact exist which require this Court to deny Plaintiff's Partial Motion for Summary Judgment. Specifically, the Defendants dispute that an agreement was entered into between ITP and/or Jenks Brothers and Chris Magleby and Jill Magleby. Moreover, there exists a genuine issues of material fact regarding the value of work performed by Maglebys, and the amount that Maglebys would be paid for their services.

A. Plaintiff's Lien Fails For Reason That It Does Not Substantially Comply With The Requirements of Idaho Code § 45-507.

To create a valid lien, there must be substantial compliance with the requirements of the statute. *L & W Supply v. Chartrand Family Trust*, 136 Idaho at 743, 40 P.3d at 101 (2002). It is clear that materialman's liens are creatures of statute and statutory requirements must be substantially complied with in order to create a valid lien. *Boone v. P & B Logging Co.*, 88 Idaho 111, 397 P.2d 31 (1964). Idaho Code 45-507 requires that certain formalities be followed, one of which is correctly stating the amount owed to the lien claimant after deducting all credits and offsets. In the matter at issue, the Defendants are disputing the amount owed to Magleby as there was never a meeting of the minds regarding what he would be paid. Moreover, the Defendants dispute the dollar figure that Magleby has stated in his affidavit and in his claim of lien. *See Affidavit of Brandon Jenks and Affidavit of Tony Jenks*.

A lien claimant needs to demonstrate the amounts alleged to be owed are true and correct. In this mater, the Plaintiff has not provided any evidence to demonstrate what the agreement was between the parties, what the value of his services were to the Defendants, and what he has been paid. Moreover, the Defendants dispute the value that Plaintiff has listed for the amount owing to him and his wife. *See Affidavit of Brandon Jenks and Tony Jenks*. Genuine issues of material fact exist on the matter of whether Plaintiff's lien is valid and whether the amount alleged in the lien is correct.

B. Plaintiff's Should Not Be Granted Summary Judgment On Its Second Cause of Action Because There Was Not a Meeting of The Minds Between the Parties And Genuine Issues of Material Fact Exist.

The question of whether there was a sufficient meeting of the minds to form an agreement is to be determined by the trier of fact. *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct.App.1983). The minds of the parties must meet as to all the terms before a contract is formed. *Turner v. Mendenhall*, 95 Idaho 426, 429, 510 P.2d 490, 493 (1973). Plaintiff's counsel correctly states the law regarding meeting of the parties' minds when he states, "Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties." *Thomas v. Schmelzer*, 118 Idaho 353, 356, 796 P.2d 1026, 1029 (Ct. App. 1990).

There was not a written agreement between any of the parties captioned in this matter. Further, as evidenced by the affidavits filed with this brief, a genuine issue of material of fact exists regarding who was hired by Defendants, what the agreement for payment would be between the parties, and what has been paid to the Plaintiffs. For these reasons, the Plaintiffs should not be granted summary judgment. Clearly, there was not a mutual understanding between the parties to form an agreement in this matter. A meeting of minds never occurred.

CONCLUSION

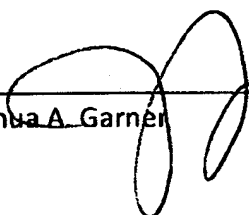
Plaintiff requests that this Court deny Plaintiff's Partial Motion for Summary Judgment. Summary judgment is improper in this matter for reason that genuine issues of material fact exist in this matter.

For the above-listed reasons, Defendants respectfully request as follows:

1. That Plaintiff's Motion for Summary Judgment be denied;

2. That Defendants receive its attorney fees and costs for defending Plaintiff's Motion for Summary Judgment; and

2. That Defendants receive any other relief deemed appropriate by this Court.
DATED this 8 day of February, 2010.



Joshua A. Garner

CERTIFICATE OF SERVICE

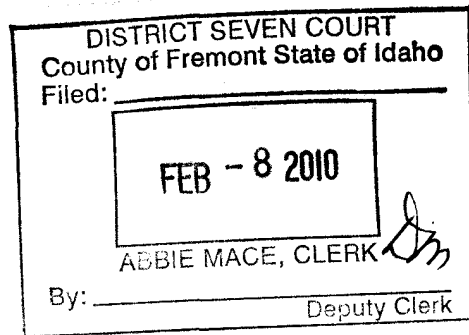
I HEREBY CERTIFY that on the 8 day of February, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile to: (208) 523-4400
☐ Overnight Mail


Joshua A. Garner

Joshua A. Garner
 THE LAW OFFICE OF
 JOSHUA A. GARNER, PLLC
 24 South 1st West
 P.O. Box 1014
 Rexburg, ID 83440
 Telephone: (208) 359-3181
 Facsimile: (208) 359-5914
 ISBN: 7420



Attorney for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
 SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
 IDAHO TRADEMARK PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

AFFIDAVIT OF TONY JENKS

State of Idaho)
)ss
 County of Madison)

Tony Jenks, having been first duly sworn, deposes and states:

1. I am over the age of 18 years, and I am a member of Jenks Brothers, Inc., named as the Defendant in the above-captioned matter. I am also a member of Idaho Trademark Properties, LLC.
2. I have reviewed the Affidavits of Jill Magleby and Chris Magleby in Support of Partial Summary Judgment. I make this affidavit in response to the allegations and contentions made by both Jill and Chris in their affidavits.

3. I make this affidavit according to my personal knowledge and experience as it pertains to the matter captioned above.

4. As a member of Jenks Brothers, Inc. and Idaho Trademark Properties, LLC, I never entered into an agreement to pay Chris Magleby or Jill Magleby the one and one-half percent (1.5%) of the gross sales price from the sale of the subject property in exchange for their services.

5. Jenks Brothers, Inc., never requested Jill Magleby to be the interior decorator for the subject property. Idaho Trademark Properties, LLC never requested Jill Magleby to be the interior decorator for the subject property.

6. If Jill Magleby performed services at the subject property, it was at the request of either Kevin Garn or Tanya Garn, as Jill Magleby has suggested in paragraph 5 of her affidavit.

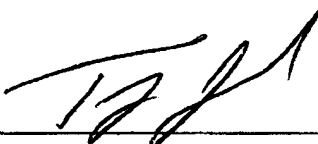
7. Jenks Brothers, Inc., is aware that Chris Magleby performed services at the subject property. However, Chris was never promised payment of one percent (1%) of the gross sale of the subject property for his services.

8. Jenks Brothers, Inc., and Idaho Trademark Properties, LLC, disagrees that Chris Magleby has not been paid for his services. Further, if Chris Magleby has not been paid for his services, then Jenks Brothers, Inc., disagrees that the value of services performed by Chris and/or Jill, as outlined in paragraph 13 of Chris Magleby's Affidavit, were valued in excess of \$23,250.00.

9. I believe there are genuine issues of material fact that prevent the Plaintiffs from receiving summary judgment in this matter; namely, whether there was an agreement between Jenks Brothers, Inc., and either Chris Magleby, Jill Magleby, or Selective Builders, whether there was an agreement with regards to the amount the Plaintiffs were to receive if an agreement did exist between Jenks Brothers, Inc. and the Plaintiffs, and whether the dollar figure set by the Plaintiffs is accurate.

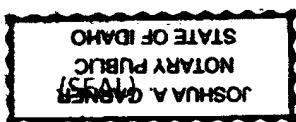
10. I respectfully request that this Court deny Plaintiff's Motion for Partial Summary Judgment.

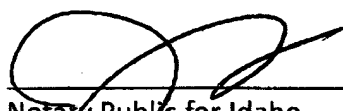
DATED THIS 8 day of February, 2010.



Tony Jenks

Subscribed and sworn to before me this 8 day of February, 2010.





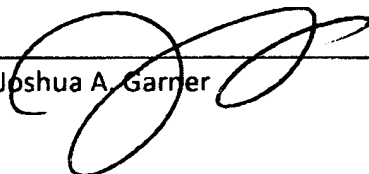
Notary Public for Idaho
Residing at: Rexburg, ID
Commission expires: 10-10-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of February, 2010, I served a copy of the foregoing
AFFIDAVIT OF TONY JENKS, on the following individuals by the method of delivery designated:

David A. Johnson
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405
(208) 523-4400

() U.S. Mail () Hand Delivered (☒) Facsimile



Joshua A. Garner

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Defendant

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: FEB - 8 2010 ABBIE MACE, CLERK By: _____ Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

AFFIDAVIT OF BRANDON JENKS

State of Idaho)
)ss
County of Madison)

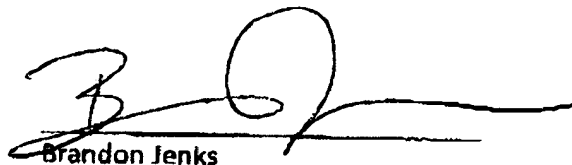
Brandon Jenks, having been first duly sworn, deposes and states:

1. I am over the age of 18 years, and I am a member of Jenks Brothers, Inc., named as the Defendant in the above-captioned matter. I am also a member of Idaho Trademark Properties, LLC.
2. I have reviewed the Affidavits of Jill Magleby and Chris Magleby in Support of Partial Summary Judgment. I make this affidavit in response to the allegations and contentions made by both Jill and Chris in their affidavits.

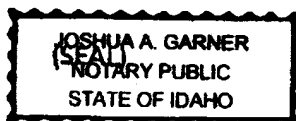
AFFIDAVIT OF BRANDON JENKS—Page 1


3. I make this affidavit according to my personal knowledge and experience as it pertains to the matter captioned above.
4. As a member of Jenks Brothers, Inc. and Idaho Trademark Properties, LLC, I never entered into an agreement to pay Chris Magleby or Jill Magleby the one and one-half percent (1.5%) of the gross sales price from the sale of the subject property in exchange for their services.
5. Jenks Brothers, Inc., never requested Jill Magleby to be the interior decorator for the subject property. Idaho Trademark Properties, LLC never requested Jill Magleby to be the interior decorator for the subject property.
6. If Jill Magleby performed services at the subject property, it was at the request of either Kevin Garn or Tanya Garn, as Jill Magleby has suggested in paragraph 5 of her affidavit.
7. Jenks Brothers, Inc., is aware that Chris Magleby performed services at the subject property. However, Chris was never promised payment of one percent (1%) of the gross sale of the subject property for his services.
8. Jenks Brothers, Inc., and Idaho Trademark Properties, LLC, disagrees that Chris Magleby has not been paid for his services. Further, if Chris Magleby has not been paid for his services, then Jenks Brothers, Inc., disagrees that the value of services performed by Chris and/or Jill, as outlined in paragraph 13 of Chris Magleby's Affidavit, were valued in excess of \$23,250.00.
9. I believe there are genuine issues of material fact that prevent the Plaintiffs from receiving summary judgment in this matter; namely, whether there was an agreement between Jenks Brothers, Inc., and either Chris Magleby, Jill Magleby, or Selective Builders, whether there was an agreement with regards to the amount the Plaintiffs were to receive if an agreement did exist between Jenks Brothers, Inc. and the Plaintiffs, and whether the dollar figure set by the Plaintiffs is accurate.
10. I respectfully request that this Court deny Plaintiff's Motion for Partial Summary Judgment.

DATED THIS 8 day of February, 2010.


Brandon Jenks

Subscribed and sworn to before me this 8 day of February, 2010.



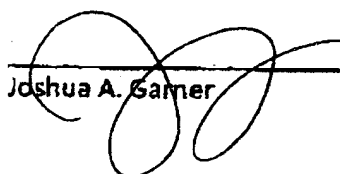

Notary Public for Idaho
Residing at: Rexburg, ID
Commission expires: 10.10.2012

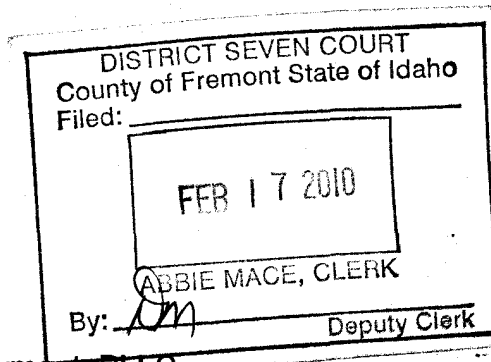
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of February, 2010, I served a copy of the foregoing
AFFIDAVIT OF TONY JENKS, on the following individuals by the method of delivery designated:

David A. Johnson
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405
(208) 523-4400

() U.S. Mail () Hand Delivered (☒) Facsimile


Joshua A. Garner



David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,**

Defendants.

Case No: CV-08-469

MOTION TO STRIKE (Partial)

David A. Johnson, attorney for Plaintiffs herein, moves the Court to Strike paragraphs 7, 8, 9, and 10 of the Affidavit of Tony Jenks and the Affidavit of Brandon Jenks (Collectively referred as the Jenks).

This motion is based upon IRCP 56(e). "The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the

1-MOTION TO STRIKE (Partial)

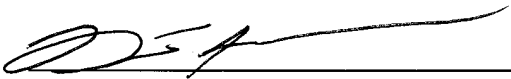
requirement of admissibility or competency under Rule 56(e). *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)" As cited in *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (Idaho, 2008).

The challenged paragraphs wherein they deny liability are simply general denials, are speculative, without foundation and simply conjecture. ". . . [I]t is well settled that if a motion for summary judgment is supported by a particularized affidavit, the opposing party may not rest upon bare allegations or general denials. The party must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e), *Barlow's, Inc. v. Bannock Clearing Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App.1982)" *State, ex rel. Dept. of Labor and Indus. Services v. Hill* 118 Idaho 278, 284, 796 P.2d 155, 161 (Idaho App.,1990).

Jenks fail to provide any specific information concerning such facts as to why they believe Magelbys were paid for their services. If they had made payment, they should be able to make a factual declaration as to how much they paid. Nor are there any statements of fact as to what the Jenks believe the value of the services provided by Magelbys was. Simply disagreeing with something is not a statement of fact with foundation.

Paragraphs 9 and 10 are particularly void of factual content and are simply argumentative, speculative, without foundation and merely state a belief or position.

DATED: February 16, 2010


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on February 16, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name & Address

Method of Service

Joshua A. Garner, PLLC
24 S. 1st West
Rexburg, ID 83440

Mail

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

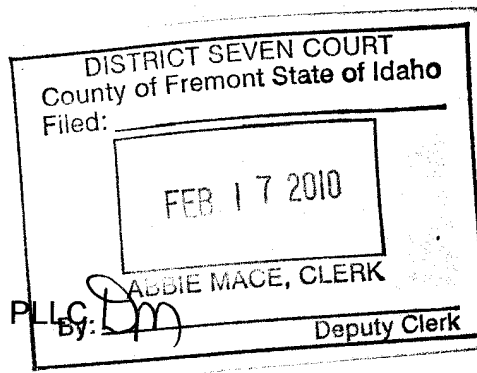
Mail

Honorable Greg Moeller
Madison County Courthouse
P.O. Box 389
Rexburg, ID 83440

Mail



David A. Johnson, Esq.



David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,**

Defendants.

Case No: CV-08-469

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

David A. Johnson, on behalf of the Plaintiffs, Chris Magleby and Jill Magleby (Maglebys), hereby replies to the Defendant Jenks Brothers Brief in Response to Plaintiff's Motion for Partial Summary Judgment as follows:

Jenks Brothers admit that they were the general contractor for the subject property and that they, on behalf of the owner of the property, requested the services of

1- PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Chris Magelby which would serve as a basis of liability. As a general contractor, they are at least statutory agents of the owner. Idaho Code §45-501.

Jenks are intentionally vague in not describing what the terms of the contract, agreement, or understanding was between the Defendants and the Magelbys. There is no statement of the events as to what was stated in any conversation between themselves and Magelbys.

Based upon the undisputed portions of the affidavits of Magelbys, the following facts are established:

1. Brandon Jenks asked Chris Magelby to manage the construction on the Subject Property, attend weekly meetings, etc., which he did.
2. Chris Magleby was managing other projects for the Jenks wherein he was paid 1% of the sales price for his services.
3. The Defendants were using a different interior decorator, but were not happy with her services. They requested Jill to provide the interior decorating for the property and act as a liaison between ITP and the Jenks. The previous decorator stopped working and Jill started working and meet directly with the Garns.
4. Brandon Jenks left a hunting trip to discuss compensation with Chris Magelby and went over the management fees for both Chris and Jill Magelby.
5. The charges of the previous decorator were \$1.00 per square foot.
6. The Maglebys performed the services agreed upon.
7. The value of the services were in excess of \$23,250.00.

Normally, when a party directly disputes the statements of the party moving for summary judgment, the same is denied. However, in this case the Jenks Brothers skirt the facts and merely make general denials. The one factual issue that they do dispute is the amount of money the Magelbys were to be paid or the value of their services.

Even if there was not a proper denial of a specific amount for this project, summary judgment is appropriate. As undisputed, there was a course of dealing between the Defendants (except Garns) where Magelby was consistently paid 1% of the sales price. The law has consistently used "customary in the trade", "course of dealing" or "course of performance" to establish a missing term of a contract. *Howard v. Blue Cross of Idaho Health Service, Inc.* 114 Idaho 485, 757 P.2d 1204 (1987). *Olmstead v. Heidelberg Inn, Inc.* 105 Idaho 774, 673 P.2d 76 (1983).


Of note is the fact that Magelbys' services were known to all defendants including Garns. There is no challenge that Magelbys provided services related to the subject property.

Jenks fail to cite any authority for their proposition that if the stated amount in a claim of lien is incorrect, that the same voids the lien. Pursuant to Idaho Code §45-507(3)(a) the lien only has to have "... A statement of his *demand*, after deducting all just credits and offsets;"(emphasis added). The intent is to provide notice on public records as to what is being sought.

Magelbys incorporate by reference the Motion to Strike filed herewith. The admissible, undisputed fact is that Magelbys' statement of value for their services is that the same is over \$23,250.00.

For the reasons stated above, Maglebys are entitled to summary judgment, both as to the lien of foreclosure against the property and a monetary judgment as to the Defendants Idaho Trademark Properties, LLC, and Jenks Brothers, Inc.


DATED: February 16, 2010


WRIGHT, JOHNSON TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on February 16, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name & Address	Method of Service
Joshua A. Garner, PLLC 24 S. 1 st West Rexburg, ID 83440	Mail
Kent W. Gauchay Simpson & Gauchay PO Box 50484 Idaho Falls, ID 83405-0484	Mail
Honorable Greg Moeller Madison County Courthouse P.O. Box 389 Rexburg, ID 83440	Mail


David A. Johnson, Esq.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY
MINUTE ENTRY

STATE OF IDAHO)
 Plaintiff,)
Vs.)
)
)
)
 Defendant)
_____)

MINUTE ENTRY

District Seven Court
County of Fremont
State of Idaho
Date: 2/23/10
Time: 3:38 pm
Abbie Mace, Clerk
Deputy Clerk m

JUDGE:
REPORTER:
DATE:
CASE:
CLERK:
HEARING:
ATTORNEY:

GREGORY W. MOELLER
CAROL
FEBRUARY 23, 2010

DEBORAH MACE
LAW AND MOTION

DISK 7

338

MAGELBY VS GARN; ETAL

MR JOHNSON FOR PLAINTIFF

MR GARNER AND MR GAUCHAY FOR DEF.

APPEARS ON MOTIONS. THE COURT COMMENTS ON MEETING IN
CHAMBERS. THE COURT COMMENTS ON PARTY MENTIONED IN
COMPLAINT. THE COURT REPRESENTED PARTY. WILL DO ORDER
TO RECUSE. SELF D.Q.

NOTHING FURTHER FROM COUNSEL. WILL BE IN RECESS IN
THIS MATTER.

DOCUMENT
SCANNED

I hereby certify that the above is a true and accurate record of the hearing
minutes.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR FREMONT COUNTY

DISTRICT SEVEN COURT	
County of Fremont State of Idaho	
Filed:	MAR 4 2010
By: ABBIE MACE, CLERK	<i>dm</i>
	Deputy Clerk

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

Vs

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS BROTHERS, INC.
and DOES 1-10

Defendants.

CASE NO: CV- 2008-469

ORDER OF
SELF-DISQUALIFICATION
PURSUANT TO I.R.C.P 40(d)(4)

IT IS HEREBY ORDERED that the undersigned District Judge deems himself
disqualified from further proceedings in the above-entitled matter with cause being he
was previously part of the law firm representing the defendant in this case, and the case is
transferred to BURTON BUTLER, for reassignment.

Dated this 4th day of March, 2010.

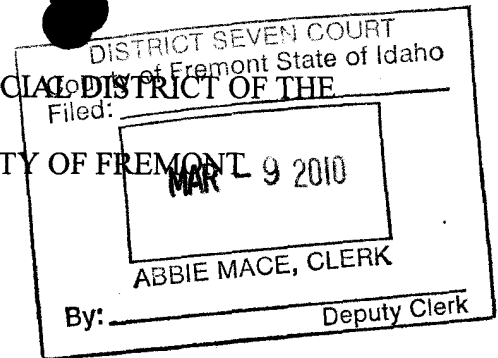
Copies To:
David A. Johnson
Kent W. Gauchay
Joshua A. Garner
Burton Butler



Gregory W. Moeller
Honorable Gregory W. Moeller
District Judge

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT



CHRIS AND JILL MAGLEBY, dba)
SELECTIVE BUILDING,)

Plaintiff,)

vs.)

KEVIN AND TANYA GARN, husband)
and wife, IDAHO TRADEMARK)
PROPERTIES, LLC, JENCKS BROTHERS)
INC. AND DOES 1-10)

Defendant.)


ORDER OF ASSIGNMENT

Case No. CV-2008-469

IT IS HEREBY ORDERED that the above-entitled case is referred to the Honorable

Darren B. Simpson, District Judge for further proceedings.

DONE AND DATED March 5, 2010.


Burton W. Butler
Trial Court Administrator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order of Assignment was personally delivered, by hand delivery to the Bonneville County Courthouse Box, sent by facsimile or mailed by first class mail with prepaid postage as indicated below on March 5, 2010:

Clerk of Court, Fremont County Courthouse - mailed

Hon. Darren B. Simpson, District Judge, Bingham County Courthouse - mailed

David A. Johnson, Esq., Bonneville County Courthouse Box

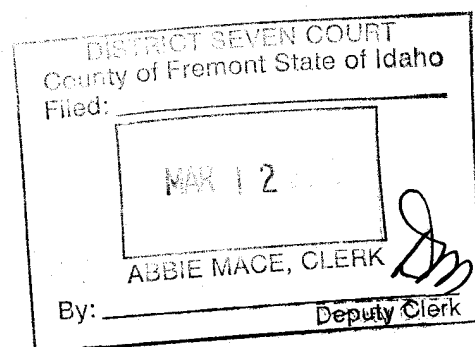
Kent W. Gauchay, Esq., Bonneville County Courthouse Box

Joshua A. Garner, Esq., 330 Oaktrail Drive, Rexburg, Idaho 83440

Fremont County deputy clerks to distribute copies to all parties or attorneys of record and/or parties at issue that are not listed on the Certificate of Service.


Administrative Assistant

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**


Defendants.

Case No: CV-08-469

NOTICE OF SERVICE

David A. Johnson, attorney for Chris and Jill Magleby in the above-entitled matter, hereby gives notice that on March 10, 2010, Plaintiff's Second Set of Interrogatories and Request for Production of Documents to Defendants Idaho Trademark Properties, LLC, and Jenks Brothers, Inc., together with a copy of this notice was served by U.S. Mail on Joshua A. Garner, The Law Office of Joshua A. Garner, PLLC, 24 South 1st West, Rexburg, ID 83440.

DATED: March 10, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 10, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name and Address


Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

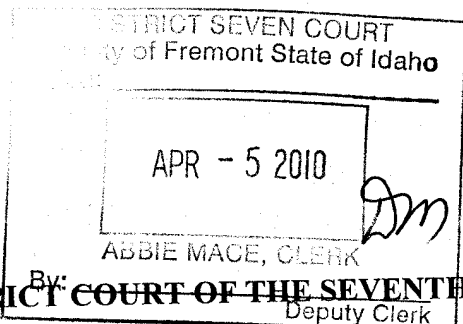
Method of Service

Mail

Mail



David A. Johnson, Esq.



FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

April 2, 2010
AT 8:51 a.m.

DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

ORDER DIRECTING COPIES
OF ALL DOCUMENTS TO BE
TRANSMITTED TO THE
PRESIDING JUDGE AT HIS
RESIDENT CHAMBERS

THIS MATTER having been assigned to District Judge Darren B. Simpson, whose
resident chambers are in Bingham County, Idaho, falls within the mandates of Idaho Rule of
Civil Procedure ("I.R.C.P") 7(b)(3)(F), which reads:

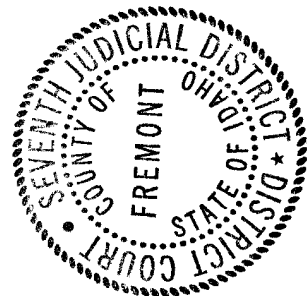
"If the office of the presiding judge or magistrate in any action is
outside of the county in which an action is pending, the party serving any
motion, affidavit, or brief, shall simultaneously send a copy of the
presiding judge or magistrate, which shall be in addition to the filing of the
originals with the court of record.

Accordingly, it is ORDERED:

The parties in this action shall file all original pleadings, briefs, affidavits or other
documents with the District Clerk in Fremont County, Idaho. A copy of any such filing
shall be submitted immediately by facsimile, overnight or regular mail services, to the
chambers of District Judge, Darren B. Simpson, in care of the District Clerk of Bingham
County, Idaho.

DATED this 15 day of April 2010.

DARREN B. SIMPSON,
District Judge



Order Directing Copies of All Documents to be Transmitted to the
Presiding Judge at His Resident Chambers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ORDER DIRECTING COPIES OF ALL DOCUMENTS TO BE TRANSMITTED TO THE PRESIDING JUDGE AT HIS RESIDENT CHAMBERS** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 3rd day of April 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

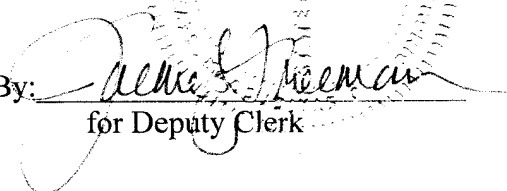
Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

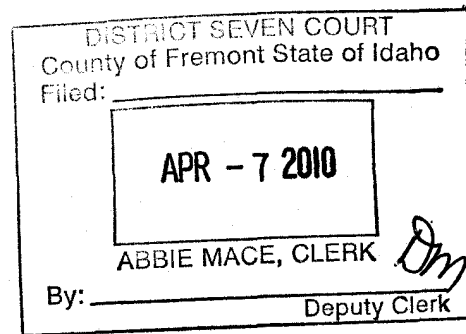
Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: 
for Deputy Clerk

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**NOTE OF ISSUE AND REQUEST
FOR TRIAL SETTING**

TO: CLERK OF THE DISTRICT COURT, COUNTY OF FREMONT

COMES NOW David A. Johnson, attorney for Plaintiffs herein, pursuant to Idaho Rules of Civil Procedure Rule 40(b) and requests that this case be set for trial. The following information is given pursuant to the Idaho Rules of Civil Procedure:

1. Type of action: Collection
2. Court or jury case: Court
3. Jury timely demanded according to Rule 38(b), I.R.C.P.: N/A

1- NOTE OF ISSUE AND REQUEST FOR TRIAL SETTING

4. Name and address of opposing counsel:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

5. Estimated trial time: One day.
6. Trial dates **not** available to counsel for Petitioners:

May 5-7, 10-12, 21, 2010
June 1, 9, 16, 17, 23, 24, 2010
July 14, 26-30, 2010
August 6, 2010

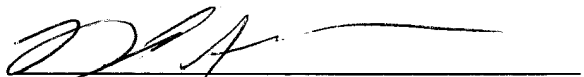
7. Name of member of firm or associate who will try the case:

David A. Johnson, Esq.

8. If jury case, have parties agreed on less than 12 jurors? N/A
9. Would mediation be beneficial? Mediation is not likely to be successful in this matter.

The above-entitled case is at issue as to all parties and Plaintiff requests that the same be set for trial.

DATED: April 6, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on April 6, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484


Mail

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Mail

Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, #205
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

April 8, 2010
AT 11:15 a.m.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Plaintiffs' pending MOTION FOR PARTIAL
SUMMARY JUDGMENT previously filed in this matter will be called up before the
Honorable Darren B. Simpson, on the 21st day of May, 2010 at the hour of 3:00p.m., at
the Fremont County Courthouse.

DATED this 8TH day of April 2010.

Darren B. Simpson
DARREN B. SIMPSON,
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF HEARING was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 5th day of April 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

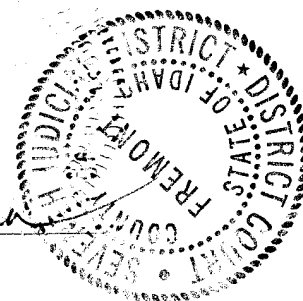
☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: *James R. Neelman*
for Deputy Clerk



Kent W. Gauchay
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000
I.S.B. #2709

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; text-align: center;">APR 15 2010</div> By: <u>DM</u> ABIE MACE, CLERK Deputy Clerk

Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.)
SELECTIVE BUILDERS,)
)
Plaintiffs,)
)
vs.)
)
KEVIN AND TANYA GARN, husband)
and wife, IDAHO TRADEMARK)
PROPERTIES, LLC, JENKS)
BROTHERS, INC., and DOES 1-10)
)
Defendants.)
_____)

Case No. CV-08-469

RESPONSE TO NOTE OF ISSUE

1. Type of Case: Collection
2. Court or Jury Case: Court
3. Jury timely demanded according to Rule 38(b), I.R.C.P.: N/A
4. Names and addresses of opposing counsel:

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment
477 Shoup Avenue, Ste 109
PO Box 52251
Idaho Falls, ID 83405

1. RESPONSE TO NOTE OF ISSUE

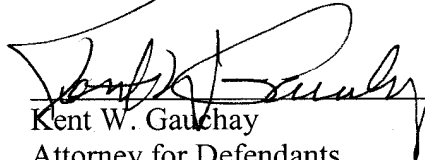
Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

5. Estimated trial time: Four days.
6. Trial dates NOT AVAILABLE to counsel responding to request of trial setting:

May 10, 11, 12, 19, 20, 24, 26, 31;
June 8-11, 14-18, 25, 28, 30; July 12, 21-23;
and August 25, 30, 31, 2010.
7. Name of attorney who will try the case: Kent W. Gauchay, Esq.
8. If jury case, have parties agreed on less than twelve jurors: n/a.
9. Would mediation be beneficial? Yes.
10. The undersigned certifies that the above entitled case is not at issue as to all parties.

DATED this 14th day of April, 2010.

SIMPSON & GAUCHAY


Kent W. Gauchay
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 14 day of April 2010, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

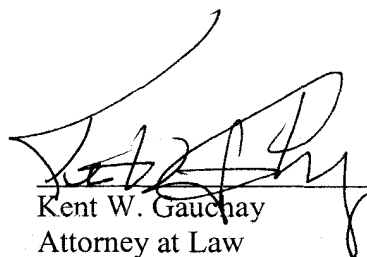
DOCUMENT SERVED: **RESPONSE TO NOTE OF ISSUE**

PERSON SERVED: David A. Johnson, Esq.
 Wright, Johnson, Tolson & Wayment
 477 Shoup Avenue, Ste 109
 PO Box 52251
 Idaho Falls, ID 83405

 Joshua A. Garner, Esq.
 The Law Office of Joshua A. Garner, PLLC
 24 South 1st West
 Rexburg, ID 83440

 Honorable Darren B. Simpson
 c/o Bingham County Clerk
 501 N. Maple, # 205
 Blackfoot, ID 83221-1700

- ☐ Hand Delivered
- ☒ Mail
- ☐ Fax



Kent W. Gauchay
Attorney at Law

3. RESPONSE TO NOTE OF ISSUE

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
April 22, 2010
AT 10:22 a.m.
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a TELEPHONIC STATUS CONFERENCE
regarding the above-entitled matter will be held *Monday, May 3, 2010 at 11:00a.m.*, with
the office of Mr. David Johnson, Esq., coordinating the conference call.

Counsel for all parties involved are to have their calendars available for further
scheduling in this matter.

DATED this 22nd day of April 2010.

DARREN B. SIMPSON,
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF HEARING was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 22nd day of April 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

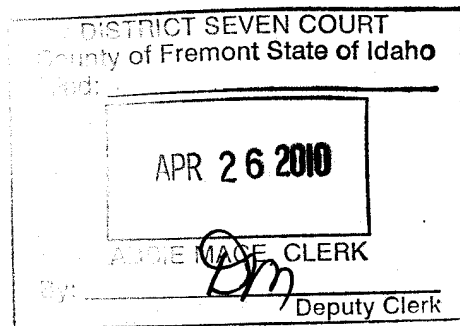
Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: 
for Deputy Clerk

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No. CV-08-469

**PARTIAL PUBLICATION OF THE
DEPOSITION OF ANTHONY JENKS**

David A. Johnson, attorney for Plaintiffs, pursuant to Idaho Rule of Civil Procedure 32, for purposes of Summary Judgment/Motion for Reconsideration, requests the Court to publish the following portions of the Deposition of Anthony Jenks taken April 2, 2010:

Anthony (Tony) Jenk's incorporation of the deposition testimony of Brandon

Jenks:

Q Is there anything that you would, can recall that would differ from his testimony or your recollection?

1- PARTIAL PUBLICATION OF THE DEPOSITION OF ANTHONY JENKS

A On some questions there -- I was on site more than he was, you know, checking on things that could be, not a variation, but just a little bit more detailed to possibly one or two questions probably.

(A. Jenks Dep. 7:1-8, Apr. 2, 2010)

Q Do you recall doing anything to put Tanya Garn and Jill Magleby together.

A Yes.

Q What was that?

A I had arranged that meeting to get those two together to decide on those materials so we could move forward with the home once we signed a purchase and sale to move forward.

Q What was your reason for calling that meeting or having the parties come together?

A So we could get Tanya and Kevin the materials and design that they wanted in the home.

(A. Jenks Dep. 23:6-17, Apr. 2, 2010)

Q Okay. But you had used them on Jenks Brothers' projects before this condo project, correct?

A Yes.

Q They had received a percent and a half.

A Yes.

(A. Jenks Dep. 31:14-19, Apr. 2, 2010)

Q So did you make any statements to Idaho Trademark Properties that you had hired the Magleby's to do the supervision?

A Yes. They knew they were working there.

Q When was that knowledge conveyed to the other members?

A When they began work there.

Q Did you have any conversations with the Magleby's about how they would be compensated in the summer of 2007?

A Yes.

Q What was that conversation -- first of all, where did it take place? I know sometimes we combine conversations together, but just describe it as best you can.

A We had several conversations. I mean, I would see Chris on a weekly basis. I thought I was working with the partners to get -- kind of what we had done in the past. There was no set agreement there. But I told him I would do everything in my power to get him taken care of.

Q Did you make any statements to the Magleby's that you would handle it on a similar basis than what you had done on other projects with them?

A I believe there was a similar basis. But saying, you know, this is what it's going to be; I don't believe we ever had that final saying until we had approval from the other partners.

Q Was there any conversation that their compensation was subject to approval by the other partners?

A I believe I lead on to that, yes.

Q Okay. Tell me how.

A Just in conversation saying: I will get this approved from the other owners. We'll see where -- what they have to say about moving forward.

Q Okay. But in the process did you ask the Magleby's to immediately become involved?

A Yes. To do the project, yes.

Q Okay. Did you ever have any conversations with the Magleby's in which compensation would be something other than a percentage basis?

A On one occasion, or several occasions I told him if the others would not pay their portion I would try to pay what I could out of my ownership in the project.

Q Was that after the work had been done?

A During and afterwards.

Q So when would be the first time -- well, I am going to start over because I am confused. Okay? Say it again what you told them.

A I told Chris that I can't speak for the other ones. But for my ownership I would do my best. You know, if I got money back out of the project from when I got paid, to get them current on what they believe we had agreed on.

Q What was it that you agreed on?

A There was no separate figure because there was no figure agreed on with the whole ownership.

Q Was there any conversations you had with the Magleby's that they would be paid either on a fixed-price basis, an hourly basis or anything like that?

A No. There was no fixed price set.

Q Would you agree that they are entitled to some compensation for the Silverhawk project?

A Yes.

(A. Jenks Dep. 12:25-15:22, Apr. 2, 2010)

Q Do you remember the specifics of any discussion with regard to the Magleby's involvement in this project?

A With?

Q The other principles.

A We had -- as Jenks Brothers we moved forward and hired him. There was definitely a discussion of moving forward. And there was some dismay of the partnership. But it was never, you know, a yes or a no. It was agree or disagree.

(A. Jenks Dep. 44:5-14, Apr. 2, 2010)

DATED: April 23, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on April 23, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name & Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Fax: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Fax: 359-5914

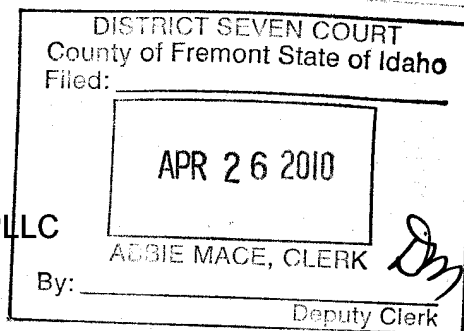
Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, #205
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No. CV-08-469

**PARTIAL PUBLICATION OF THE
DEPOSITION OF BRANDON JENKS**

David A. Johnson, attorney for Plaintiffs, pursuant to Idaho Rule of Civil Procedure 32, for purposes of Summary Judgment/Motion for Reconsideration, requests the Court to publish the following portions of the Deposition of Brandon Jenks taken April 2, 2010:

Q So tell me about what your arrangement was as far as duties in Idaho Trademark Properties, particularly as it related to the Silverhawk property.

A Our duty was to build the house. I don't know that it got more detailed on our end than that.

1- PARTIAL PUBLICATION OF THE DEPOSITION OF BRANDON JENKS

Q Was that as a general contractor?

A Yes.

Q What is your understanding of what the duties of a general contractor are?

A To oversee the construction of the home.

Q What parts of that.

A Say the entire home.

Q Okay. Did you believe that particularly, as it related to the Silverhawk property, that you were responsible for hiring subcontractors?

A Normally, yes.

(B. Jenks Dep. 12:6-25, Apr. 2, 2010)

Q What was your involvement with the Magleby's?

A It was -- me and Tony were the ones that brought them on to the project to do everything that have been discussed within reason.

Q Okay. So When did that take place?

A I could not tell you for sure.

Q Can you give me an approximation?

A If we started in November I would say it was a few months after that.

Q All right. Tell me about the process of how they were brought in.

A Chris and Jill had done a lot of work for us on townhomes, another project we had. We were pleased with them. We liked working with them. So naturally it transitioned into another project that we, Jenks Brothers, was working on.

Q That was the Silverhawk?

A Yes.

Q Tell us about that transition?

A I don't know what to say about the transition.

Q Well, did you call them up on the phone? Did you ask them in a personal meeting if they would be involved?

A I am sure one way or the other, yes, I did. But I could not tell you specific. But we talked a lot.

Q All right. So from what it sounds like you and the Magleby's had an ongoing business relationship?

A For sure.

Q And that they had done work for you in other units?

A Yes.

Q And that you desired to use them on the Silverhawk property?

A Yes.

Q All right. So in conjunction with that, do you recall any conversations that you personally had with the Magleby's related to the Silverhawk property?

A Directly, I could not say one specific conversation. But I know that Chris and I had numerous conversations about it. But I could not tell you a specific event when we talked.

Q Okay. Why don't you tell us what you do know.

A Okay. As we got into this project, we were more or less trying to find a way to get it all done. And so we brought Chris and Jill on to do more or less from the sheetrock on. They were going to finish the home for us.

Q How would you describe their role?

A Their role was as a subcontractor doing the work. And we discussed them being a manager for us as well.

Q So it almost sounds like they were acting as assistant to the general contractor?

A That would be reasonably accurate.

Q Would they be providing the supervision that normally would be provided by a general contractor?

A A portion of it, yes.

Q Okay. Now they represent that those type of conversations took place in July of 2007. Would you have any reason to differ from that?

A No.

Q Okay. Now they've made representations that you agreed to pay them, Chris Magleby, a one percent of the sales price. Do you agree or disagree with that?

A We discussed that. The agreement was never formalized because I had to -- I had to make that concession with the other people involved as well.

Q Because it was being an Idaho Trademark Property?

A Yes. Because I wasn't the sole -- normally something like that Tony and I would do something like that. Whatever I did -- whatever we negotiated we live by. But of course this was a different situation because I had to take it back to three other people.

Q That would be also Brady Gardner.

A Yes.

Q Chris and Mike Ferguson?

A That's correct.

Q Okay. Was that expressed to the Magleby's.

A I can't tell you that for sure. I thought it was, but apparently not.

Q Okay. I mean, particularly did you ever tell the Magleby's that you had to get approval from the rest of the Trademark Property participants?

A I would say given our conversations, yes. If I did not say it, I thought they understood that.

Q Okay. And what would you base that understanding on?

A His understanding of our partnership and the workings of Idaho Trademark Properties.

Q Okay. Did they do work?

A Who?

Q The Magleby's?

A On --

Q The Silverhawk property?

A Yes.

Q Did they do it according to your satisfaction?

A Yes.

Q What was your understanding as to how they were going to get paid for their services.

A The labor, specifically that they performed for the finish trim and painting, they would be paid as any subcontractor; then they were going to get a management fee for performing that service.

Q What was the management fee to be based on?

A That is where the discrepancy comes in. Because if you talk to the other partners they would say there is no way they would ever pay it on the sales price. They were thinking more construction costs.

Q So, they are saying more of just as a subcontractor?

A No, because normally there is no management fee with a subcontractor.

Q So, it would be based on hourly?

A No. It would be based on the amount of dollars of the management that they did.

Q Okay. Do you know how many hours of management they did?

A I don't, but it was a lot.

Q Do you know what basis of compensation: That is, would it be on an hourly basis.

A It could be. I've never done it that way.

Q How have you done it?

A The only time I've ever done this was with Chris on our townhomes that we did -- whatever -- a percent, a percent and a half on the cost of our townhomes.

(B. Jenks Dep. 15:22-21:18, Apr. 2, 2010)

Q Do you know who was responsible for hiring -- or obtaining the materials and installing those materials?

A Through our subs, Chris and Jill took care of that.

Q Okay. And to your knowledge they are the ones who are involved in hiring the subcontractors to complete those particular tasks?

A Yes. We discussed -- yes.

Q Did you have any involvement in hiring of the subcontractors either for the construction or installation of the cabinets?

A Directly? Did I know the guy through Chris, yes.

Q Okay.

A But directly, no.

Q Okay. The direct contact was the Magleby's?

A Yes.

(B. Jenks Dep. 38:5-23, Apr. 2, 2010)

Q Well, may be the more direct question is: The Garn's would be involved in the finished product?

A Yes.

Q Did you know that Jill Magleby was working on this particular project?

A Yes.

Q And how did you know that?

A Conversations with Chris and Jill –

Q Okay.

A -- and Brady.

Q And do you know that Jill was working with the Garn's?

A Yes.

Q And what is your basis of knowledge?

A Secondhand information I suppose.

Q From who?

A Brady, I guess.

Q Okay. Well, did you understand at the time that was going on that Jill was involved in doing the interior decorating on the Silverhawk property.

A Yes. I was made aware that that was happening.

Q That is by Brady Gardner?

A I think.

(B. Jenks Dep. 40:23-41:23, Apr. 2, 2010)

Q I think I may be understanding the issue. So you understand that Idaho Trademark Property -- according to your position -- owes the Magleby's the money?

A Yes, some money for sure. Yes.

(B. Jenks Dep. 48:23-49:2, Apr. 2, 2010)

Q Obviously one area that we need to make sure we're clear on is the compensation to the Magleby's. At the time that they got involved what was your understanding as to how they were going to be compensated?

A What was my understanding? It was going to be a percentage of the project, and that would be it.

Q Okay. And apparently they were working on Riverwood at this one and a half percent, is that correct?

A Yes.

Q Did you specifically talk about the same percentage on the Silverhawk property as the Riverwood property, or whether there would be any deviation from it?

A I am sure that when we initially conversed about it, that was the case.

Q What was the case?

A That we discussed the same percentage, the same structure we had done previously.

Q Was there any discussion about more or less involvement of the Silverhawk property versus, I think, you called them townhouses?

A Specifically, I don't remember a conversation about that.

Q Okay. But your understanding, it would still be the one and a half percent?

A We discussed this. But like I say, it was never finalized with the other powers.

(B. Jenks Dep. 52:22-54:2, Apr. 2, 2010)

Q Now when you hired -- the Magleby's, were they hired for the project or the whole, or were they limited to the interior when you initially dealt with them?

A Initially, our previous business dealings would have been interior only.

Q Okay. Are you of the understanding that they took on some responsibilities on the exterior part?

A Yes.

Q What parts are you aware they took on?

A The siding.

(B. Jenks Dep. 56:21-57:7, Apr. 2, 2010)

Q So, as we sit it here today, it's your position that Selective Builders has been paid for their labor; but not their management fee?

A Yes, all the specific tasks they performed on the house, they have been paid for. The management fee is the discrepancy.

(B. Jenks Dep. 82:7-12, Apr. 2, 2010)

Q Now as far as the Magleby's, my understanding is that the management fee was a one and a half percent that you discussed?

A Yes.

Q In addition to that, they would be compensated for the actual work they did?

A That's correct.

Q That would be the same arrangement as in the Riverwood properties?

A Which portion of that are you referring to? The management fee or the --

Q Both. I mean, they would be paid a management fee of one and a half percent; but they would also be paid for actual labor?

A Similar.

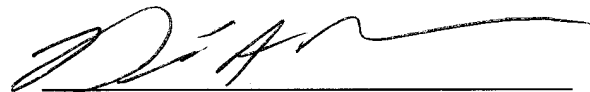
(B. Jenks Dep. 85:11-25, Apr. 2, 2010)

Q And when they started the work, the only conversation you had was the management would be similar to what was previously done?

A. Probably. That is probably true.

(B. Jenks Dep. 89:9-12, Apr. 2, 2010)

DATED: April 23, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on April 23, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name & Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

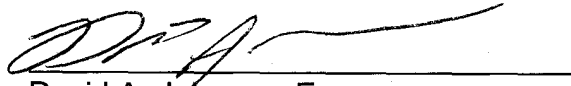
Fax: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Fax: 359-5914

Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, #205
Blackfoot, ID 83221-1700

Mail



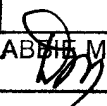
David A. Johnson, Esq.

T&T REPORTING

Depositions - Videography - Video Conferencing

P.O. Box 51020

Idaho Falls, Idaho 83405-1020

DISTRICT SEVEN COURT	
County of Fremont State of Idaho	
Filed:	
MAY - 3 2010	
ABBE MACE, CLERK	
By: 	Deputy Clerk

April 12, 2010

David A. Johnson, Esq.
WRIGHT, WRIGHT & JOHNSON, PLLC
477 Shoup Ave., Suite 109
Idaho Falls, Idaho 83405-2251

Re: State of Idaho, County of Fremont
MAGLEBY vs. GARN, et al.
Case No.: CV-08-469
Depositions of: Brandon Jenks and Anthony Jenks
Taken on: April 2, 2010

Dear Mr. Johnson:

Pursuant to Rule 30 (f) (1), I have enclosed the originals and the certified copies of the transcripts for the depositions taken in the above captioned matter. The E-Transcripts have been electronically sent.

Mr. Gauchay has been sent certified copies of the transcripts for the depositions in the above captioned matter. The E-Transcripts have been electronically sent.

The witnesses have waived the right to "Read and Sign."

If you have any questions, please contact our office.

Sincerely,



John Terrill

Enclosures

cc - Kent W. Gauchay, Esq.
Clerk of the Court
File

DOCUMENT
SCANNED

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

May 05, 2010

AT 11:00 a.m.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

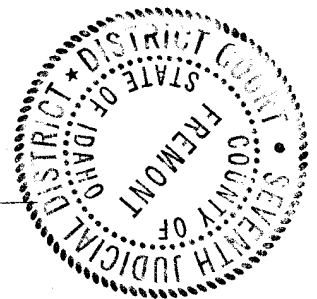
ORDER VACATING HEARING

NOTICE IS HEREBY GIVEN that the telephonic status conference previously scheduled in the above-entitled matter is hereby *vacated*, as Mr. Joshua Garner, Esq., counsel for defendants Idaho Trademark Properties, and Jenks Brothers, Inc., in unavailable due to a death in the family.

Further scheduling in this matter will take place on May 21, 2010, at the hearing for Plaintiff's Motion for Partial Summary Judgment.

DATED this 3rd day of May 2010.

Darren B. Simpson
DARREN B. SIMPSON,
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ORDER VACATING HEARING** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 5th day of May 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: 
for Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY
MINUTE ENTRY

STATE OF IDAHO)
Plaintiff,)
Vs.)
)
)
Defendant)

MINUTE ENTRY

DISTRICT SEVEN COURT County of Fremont State of Idaho	
Filed:	
MAY 21 2010	
ABBIE MACE, CLERK	
By:	Deputy Clerk

JUDGE: DARREN B. SIMPSON
REPORTER: SANDI BEBEE
DATE: MAY 21, 2010
CASE:
CLERK: DEBORAH MACE
HEARING:
ATTORNEY:

DISK 15

MAGLEBY VS GARN
DAVID JOHNSON APPEARS FOR MAGLEBY
JOSH GARNER APPEARS FOR IDAHO TRADEMARK-JENKS BRO.
KENT GAUCHAY APPEARS FOR GARN
258 **HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT**
259 **MR JOHNSON MOTION**
260 **THE COURT ASKS AS TO MR GAUCHAY'S POSITION.**
MR JOHNSON PROCEEDS. COMMENTS ON MOTION TO STRIKE
GIVES ARGUMENT AS TO MOTION FOR SUMMARY JUDGMENT.
MATERIALMANS LIEN, CONTRACT LIEN AGAINST JENKS
NOT SEEKING PERSONAL JUDGMENT AGAINST GARN.
306 **THE COURT COMMENTS ON DISPUTE AS TO WHO HIRED DEF**
AND AMOUNT TO BE PAID. MR JOHNSON RESPONDS.
THE COURT ASKS AS TO LIEN BEING PROPERLY FILED BUT HAS
WRONG AMOUNT, IS IT STILL VALID. MR JOHNSON STATES YES
AND CITES CASE LAW.
MR JOHNSON REFERS TO PARAGRAPH 9 IN AFFD.
THE COURT ASKS AS TO DEPOSITION OF BRANDON AND ANTHONY
JENKS, PARTIAL PUBLICATION-MR GARNER HAS NOT OBJECTED
MR GARNER HAS NO OBJECTION TO THOSE BEING FILED.
MR JOHNSON COMMENTS ON RULE 56E.
320 **REFERS TO CASES-CITES SUB SECTION**
323 **MR GARNER ON REBUTTAL. COMMENTS ON HIS BRIEF. FEELS**
GENUINE ISSUE OF MATERIAL FACT EXISTS.
GOES OVER SECTIONS OF BRIEF PAGE 3 OF DEPOSITION OF
ANTHONY JENKS.
ASKS FOR PARAGRAPH 7,8,9 AND 10 TO BE STRIKEN FROM
BRIEF. ASKS FOR PARTIAL SUMMARY JUDGMENT TO BE GRANTED

I hereby certify that the above is a true and accurate record of the hearing minutes.

331

MR JOHNSON ASKS FOR PARTIAL PUBLICATION OF DEPOSITION
PAGE 5. READS FROM THAT DOCUMENT.

READS FROM PAGE 10 OF BRANDON JENKS DEPOSITION.

STATES WAS A CONTRACT FOR 1 ½ PERCENT

THE COURT WILL TAKE UNDER ADVISEMENT.

MR JOHNSON COMMENTS ON STATUS CONFERENCE

WILL SET FOR STATUS CONF.

MR GARNER STATES THAT JENKS BRO HAVE GONE OUT OF
BUSINESS, PARTIES ARE CLOSE TO BANKRUPTCY, OTHER PARTY
IS MISSING IN ACTION.

MR GARNER MAY WITHDRAW, WOULD KNOW BY NEXT WEEK.

MR GAUCHAY FEELS MORE THAN ONE DAY WOULD BE NEEDED FOR
TRIAL. JURY TRIAL WAS NOT REQUESTED.

COULD GET SECOND SETTING IN OCT. WILL SET FOR OCT 5TH
2010. FIRST SETTING IN JAN OF 2011 ON THE 27TH AND 28TH.

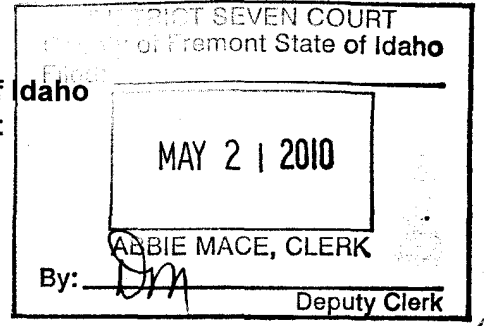
PRETRIAL ON SEPT 3RD AT 11:15 AM IN BONNEVILLE COUNTY

ASKS IF ANOTHER STATUS IS NEEDED BEFORE PRETRIAL

TELEPHONIC CONF. ON JUNE 28TH STATUS. THE COURT WILL
INITIATE CALL. THIS WILL BE IN BINGHAM.

I hereby certify that the above is a true and accurate record of the hearing
minutes.

Seventh Judicial District Court, State of Idaho
In and For the County of Fremont
151 West 1st North - Room 15
St. Anthony, Idaho 83445



Christopher J Magleby, etal.

Plaintiff.

vs.

Kevin Garn, etal.

Defendant.

Case No: CV-2008-0000469

**NOTICE OF TRIAL SETTING
AND ORDER GOVERNING
FURTHER PROCEEDINGS**

Pretrial Hearing will be held in Bonneville County on September 3, 2010 at 11:15 a.m.

The above-entitled case is hereby set for trial to commence on **Tuesday, October 05, 2010 at 09:00 AM through Wednesday, October 06, 2010**. Said trial will be held in the District Court of the Seventh Judicial District, Fremont, at the County Courthouse in St. Anthony, Idaho. This is a **COURT TRIAL**. The following pretrial schedule shall govern the proceedings:

I IT IS HEREBY ORDERED THAT :

1. NOT LATER THAN 30 DAYS prior to trial, all witnesses and summary of testimony shall be disclosed.
2. NOT LATER THAN 45 days prior to trial, all discovery must be completed and all dispositive and substantive motions must be filed. **Copies of all motions and briefs shall be sent to the court in chambers to the Bingham County Courthouse, 501 North Maple #310, Blackfoot, Id. 83221.**
3. As the trial date comes nearer, should you want a pre-trial conference call and set one up with this court.

II. IT IS FURTHER ORDERED THAT NOT LATER THAN SEVEN DAYS BEFORE TRIAL:

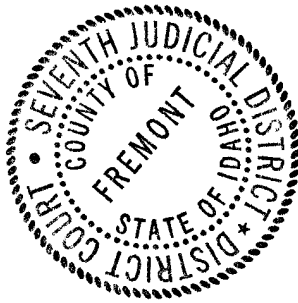
Each attorney shall:

1. Both plaintiff's and defendant's counsel shall exchange a descriptive list of exhibits proposed to be offered into evidence.
2. Counsel for each party shall pre-file with the Clerk of the Court all exhibits they intend to introduce at trial, except those for impeachment.

III. IT IS FURTHER ORDERED THAT:

1. Prior to the commencement of trial counsel for each party shall stipulate those exhibits that may be received in evidence without objection, and the Clerk shall mark such exhibits "admitted".

2. No exhibits shall be admitted into evidence at trial other than those disclosed, listed and filed in accordance with the Order, except when offered for impeachment purpose.
3. This Order shall control the subsequent course of action unless modified for a good cause shown to prevent manifest injustice.
4. The court may impose appropriate sanctions for violation of this order.



Dated: Tuesday, May 25, 2010

151 Darren B. Simpson
Darren B. Simpson, District Court Judge

SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF FREMONT

CHRISTOPHER J MAGLEBY, ETAL.

VS.

KEVIN GARN, ETAL.

Case No: CV-2008-0000469
County of Fremont State of Idaho

Filed:

NOTICE OF HEARING

MAY 2 | 2010

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Status Hearing will be held in Bingham County with Judge Simpson to initiate the call.

Hearing Monday, June 28, 2010 at 01:15 PM

Judge: Darren B. Simpson

Courtroom:

By: Abbie Mace, Clerk
Deputy Clerk

I certify that copies of this Notice were served as follows on May 25th, 2010.

Attorney's will please notify clients of court date(s), time(s) and location(s).

Plaintiff's Counsel: David A Johnson
P.O. Box 52251
Idaho Falls ID 83405

Mailed ☒ Hand Delivered _____ Faxed _____

Defendant's Counsel: Kent W. Gauchay
P.O. Box 50484
Idaho Falls ID 83405-0484

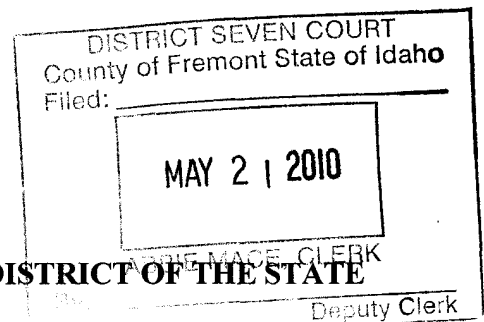
Mailed ☒ Hand Delivered _____ Faxed _____

Joshua A. Garner
PO Box 1014
Rexburg ID 83440

Mailed ☒ Hand Delivered _____ Faxed _____

Dated: May 25th, 2010
Abbie Mace
Clerk Of The District Court

By: Deborah Mace
Deputy Clerk



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

Christopher J Magleby, etal.

Plaintiff

CASE NO. CV-2008-0000469

vs.

MINUTE ENTRY

Kevin Garn, etal.

Defendant

THIS MATTER came before the Court on Friday, May 21, 2010, for the purpose of a TELEPHONIC STATUS CONFERENCE, the Honorable Darren B. Simpson, presiding.

Ms. Debby Mace, Deputy Court Clerk, was present. Ms. Sandra Beebe, Court Reporter was present.

David A. Johnson, appeared on behalf of Chris and Jill Magleby.

Kent W. Gauchay, Esq., appeared on behalf of defendant Kevin and Tanya Garn. Josh Garner, Esq., appeared on behalf of defendant Idaho Trademark Properties, LLC and Jenks Brothers, Inc.

Hearing on Motion For Partial Summary Judgement-Mr. Johnson's Motion
Mr. Johnson proceeds on argument on Motion To Strike and Motion for Summary Judgment.
Goes over Materialmans Lien and Contract Lien against Jenks. Not seeking personal judgment against Garns.

The Court comments on dispute as to who hired defendant and amount to be paid. Mr. Johnson responds. The Court asks as to Lien being properly filed but has wrong amount, is it still valid. Mr. Johnson states yes and cites case law.
The Court asks as to deposition of Brandon and Anthony Jenks, partial publication. Mr. Garner has not objected.

Mr. Johnson comments on Rule 56(e). Refers to cases and cites sub section.
Mr. Garner on rebuttal. Comments on his brief. Feels genuine issue of material fact exists.
Goes over sections of brief as to deposition of Anthony Jenks. Asks for paragraphs 7,8,9, and 10 to be stricken from the brief. Asks for partial summary judgment to be granted.

The Court will take under advisement..

Mr. Johnson comments on status conference. The Court will set for status conference. Mr. Garner States the Jenks brothers have gone out of business. Mr. Garner may be withdrawing as counsel.

Will know by next week. Jury trial has not been requested on this case.

Will set for Court trial on October 5th. Pretrial on September 3rd at 11:15 am in Bonneville County.

Another telephonic hearing will held on June 28th for status. The Court will initiate the call. This hearing will be in Bingham County.

Court was thus adjourned.

DATED this 21 day of May 2010.

/s/
Darren B. Simpson
District Judge

June 9, 2010

AT 9:02 a.m.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

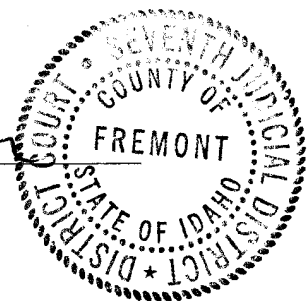
CASE No. CV-2008-469

AMENDED NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Telephonic Status Conference scheduled to take place in this matter on Monday, June 28, 2010 will be held at 11:15a.m. Further, the Pretrial Conference scheduled to take place in Bonneville County on September 3, 2010 will be at 9:00a.m.

DATED this 9TH day of June 2010.

Darren B. Simpson
DARREN B. SIMPSON,
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ORDER VACATING HEARING** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 9th day of June 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: James Freeman
for Deputy Clerk

June 29, 2010

AT 11:51 a.m.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

MINUTE ENTRY

This matter came before the Court on the 28th day of June 2010, for the purpose of a Telephonic Status Conference, the Honorable Darren B. Simpson presiding.

Ms. Marielle Pratt, Deputy Clerk was personally present. Mr. David Johnson, Esq., appeared telephonically on behalf of the plaintiffs. Mr. Kent Gauchay, Esq., appeared telephonically on behalf of defendants Garn and Mr. Joshua Garner, Esq., appeared telephonically on behalf defendants Idaho Trademark Properties, LLC and Jenks Brothers, Inc.

Court and counsel discussed the status of the case. Counsel is waiting on a decision on the motion for summary judgment. Mr. Garner informed the Court that he would be filing a motion to withdraw. Mr. Gauchay stated that he may also be filing a motion to withdraw.

The Court requested that counsel try to set the two motions to withdraw for the same time.

Court was thus adjourned.

DATED this 29th day of June 2010.

Darren B. Simpson
DARREN B. SIMPSON,
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MINUTE ENTRY** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 29th day of June 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: Jacqueline Freeman
for Deputy Clerk

May 12, 2010
AT 10:44

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS and JILL MAGLEBY, dba
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN and TANYA GARN, husband and
wife; IDAHO TRADEMARK
PROPERTIES, LLC; JENKS BROTHERS,
INC.; and DOES 1-10;

Defendants.

KEVIN and TANYA GARN, husband and
wife;

Cross-Plaintiffs,

vs.

IDAHO TRADEMARK PROPERTIES,
LLC; JENKS BROTHERS, INC.; and
DOES 1-10;

Cross-Defendants.

Case No. CV-2008-469

ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

I. STATEMENT OF THE CASE

Plaintiffs Chris and Jill Magleby, doing business as Selective Builders (hereinafter the "Maglebys"), filed a Motion for Partial Summary Judgment as to the first and second causes of action alleged in their lawsuit against Defendants Kevin and Tanya

Garn (the "Garns"), Idaho Trademark Properties, LLC ("ITP"), Jenks Brothers, Inc. ("Jenks Brothers"), and Does 1-10.¹ Jenks Brothers and ITP filed a joint response in opposition to the Maglebys' Motion.² The Garns did not respond in writing to the Magleby's Motion.

The Maglebys filed this action for breach of contract, unjust enrichment, and foreclosure of a lien they filed upon a home, built and owned by ITP (which is managed by Jenks Brothers and others) and sold to the Garns (the home at issue is hereinafter referred to as the "Cabin").³ The Maglebys allege that Jenks Brothers hired them to manage the construction of the Cabin and to complete the Cabin's interior decoration.⁴ The Maglebys further allege they were never paid the 1.5% of the gross sales price they were promised for their labors.⁵

ITP and Jenks Brothers generally denied the Maglebys' allegations and alleged numerous affirmative defenses including: the Maglebys' lack of registration with the Idaho Contractors Board (which allegedly nullifies their lien); the Maglebys' failure to provide consideration for the alleged agreement; the Statute of Frauds; unclean hands; and waiver/estoppel.⁶ The Garns also denied the Maglebys' allegations and filed cross-

¹ Plaintiffs' Motion for Partial Summary Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed January 21, 2010) (hereinafter the "**Maglebys' Motion**").

² Defendants' Brief in Response to Plaintiff's [sic] Motion for Partial Summary Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed February 8, 2010) (hereinafter "**ITP's and Jenks Brothers' Response**").

³ Complaint, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed September 12, 2008) (hereinafter the "**Complaint**"), at pp. 2-5. The Cabin is located at 3635 Redtail Street, Island Park, Idaho 83429, which location is more particularly described as: Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3, Fremont County, Idaho. See: Complaint, at Exhibit A.

⁴ Complaint, at p. 2.

⁵ *Id.*

⁶ Verified Answer to Plaintiffs' Complaint, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed November 4, 2008).

claims against ITP, Jenks Brothers and Does 1-10 for indemnification, and defective construction.⁷

A hearing was held on the Maglebys' Motion on May 21, 2010.⁸ Based upon the parties' pleadings, the record, and the relevant authorities, the Maglebys' Motion shall be granted in part and denied in part.

II. ISSUES

The Maglebys argue that they qualify for and complied with all the necessary procedural requirements of a materialman's lien against the Cabin and therefore their lien should be foreclosed.⁹ ITP and Jenks Brothers parry that the amount owed to the Maglebys is in dispute, and therefore the Maglebys' lien is not subject to foreclosure.¹⁰

The Maglebys further contend that they came to a meeting of the minds with ITP and Jenks Brothers for 1.5% of the Cabin's selling price, in payment of the Maglebys' management of the building project and completion of the interior design.¹¹ ITP and Jenks Brothers dispute that they agreed to compensate the Maglebys as alleged¹²

Based upon these arguments, the relevant issues are as follows:

- (1) Is foreclosure of the Maglebys' materialmens lien proper where the amount owed to the Maglebys is in dispute?
- (2) Does a material fact issue exist as to the terms of the alleged oral contracts between the Maglebys and ITP/Jenks Brothers?

⁷ Answer and Cross-Claim, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed January 28, 2009).

⁸ Minute Entry, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed May 21, 2010).

⁹ Maglebys' Motion, at pp. 5-6.

¹⁰ ITP's and Jenks Brothers' Response, at p. 3.

¹¹ Maglebys' Motion, at pp. 3, 6.

¹² ITP's and Jenks Brothers' Response, at p. 4.

III. FINDINGS OF FACT

The following facts are found by a preponderance of the evidence, with all reasonable inferences drawn in favor of the Garns, ITP, and Jenks Brothers.¹³

1. Brandon and Anthony Jenks hired the Maglebys to complete the interior finish-work on the Cabin, “from the sheetrock on,” and the siding.¹⁴ In general, the Maglebys acted as assistants to Jenks Brothers, the general contractor.¹⁵

2. The Maglebys had previously performed work for Jenks Brothers for a percentage of the sales price of the project.¹⁶

3. Brandon Jenks testified that he discussed paying Chris Magleby one percent (1%) of the sales price of the Cabin.¹⁷ According to Brandon, the agreement was never formalized through the other members of ITP: Brady Gardner, Chris Ferguson and Mike Ferguson.¹⁸ Brandon understood that the Maglebys would be paid for their labor for the Cabin’s finish trim and painting and would receive a management fee.¹⁹

4. ITP was aware the Maglebys were working on the Cabin.²⁰

¹³ See: *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009).

¹⁴ Partial Publication of the Deposition of Brandon Jenks, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed April 26, 2010) (hereinafter the “**Brandon Jenks Deposition**”), at pp. 2-3, 9. Although the Brandon Jenks Deposition is a document created by the Maglebys, and the actual deposition transcript is not in the record, the Garns, ITP, and Jenks Brothers agreed to the admission of the Mablebys’ reproduction of portions of the transcript. See also: Partial Publication of the Deposition of Anthony Jenks, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed April 26, 2010) (hereinafter the “**Anthony Jenks Deposition**”), at p. 5. The Anthony Jenks Deposition is also a document created by the Maglebys and admitted into evidence by agreement of the Garns, ITP, and Jenks Brothers.

¹⁵ Brandon Jenks Deposition, at pp. 2, 4.

¹⁶ Anthony Jenks Deposition, at p. 2.

¹⁷ Brandon Jenks Deposition, at pp. 4, 8, 9.

¹⁸ *Id.*

¹⁹ Brandon Jenks Deposition, at p. 5.

²⁰ Anthony Jenks Deposition, at p. 3.

5. Anthony Jenks worked to get the other partners of ITP to agree to pay Chris Magleby in the same way that Jenks Brothers had paid him on other projects.²¹ Nothing in the record reveals that ITP made a formal agreement with Chris Magleby.

6. In his affidavit, Anthony Jenks testified that if Jill Magleby performed any services on the Cabin, it was at the request of either Kevin or Tanya Garn.²² Anthony admitted, however, that he introduced Tanya Garn and Jill Magleby.²³ Nothing in the record shows that ITP formally agreed to hire Jill Magleby.

7. The Maglebys performed work on the Cabin.²⁴ They were also responsible for hiring subcontractors, and obtaining and installing materials in the Cabin, through the subcontractors.²⁵

8. On one or more occasions, Anthony Jenks told Chris Magleby that if the other partners of ITP would not pay their portion of Chris's fee, he (Anthony Jenks) would try to pay what he could out of his ownership share in the Cabin.²⁶

9. Brandon Jenks testified that ITP owes the Maglebys a management fee for their oversight of the work on the Cabin.²⁷ Anthony Jenks also testified that the Maglebys are entitled to some compensation for their work on the Cabin.²⁸

IV. PRINCIPLES OF LAW

1. If the pleadings, depositions, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and that the moving

²¹ *Id.*

²² Affidavit of Tony Jenks, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed February 8, 2010) (hereinafter the "Anthony Jenks Affidavit"), at p. 2, ¶ 6.

²³ Anthony Jenks Deposition, at p. 2.

²⁴ Brandon Jenks Deposition, at p. 5.

²⁵ *Id.*

²⁶ Anthony Jenks Deposition, at p. 4.

²⁷ Brandon Jenks Deposition, at pp. 8, 9.

party is entitled to judgment as a matter of law, a court may grant summary judgment.²⁹

Disputed facts are construed in favor of the non-moving party and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.³⁰

2. A party against whom a summary judgment is sought cannot merely rest on its pleadings.³¹ When faced with supporting affidavits or depositions, the opposing party must show material issues of fact which preclude the issuance of summary judgment.³²

3. While the moving party must prove the absence of a genuine issue of material fact,³³ the opposing party cannot simply speculate.³⁴ A mere scintilla of evidence is not enough to create a genuine factual issue.³⁵ Summary judgment is appropriate when the non-moving party cannot establish the essential elements of the claim.³⁶

²⁸ Anthony Jenks Deposition, at p. 4.

²⁹ Idaho Rule of Civil Procedure ("I.R.C.P.") 56(c); *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-7, 808 P.2d 851, 853-4 (1991).

³⁰ *Bushi v. Sage Health Care, PLLC*, 146 Idaho at 768, 203 P.3d at 698; *Lockheed Martin Corp. v. Idaho State Tax Commission*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

³¹ *Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008); *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).

³² *Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008).

³³ *Watkins v. Peacock*, 145 Idaho 704, 708, 184 P.3d 210, 214 (2008); *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798, 41 P.3d 220, 226 (2001).

³⁴ *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008).

³⁵ *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009); *West v. Sonke*, 132 Idaho 133, 138, 968 P.2d 228, 233 (1998).

³⁶ *Summers v. Cambridge Joint School District No. 432*, 139 Idaho 953, 956, 88 P.3d 772, 775 (2004); *Dekker v. Magic Valley Regional Medical Center*, 115 Idaho 332, 333, 766 P.2d 1213, 1214 (1989).

4. If reasonable persons could reach differing conclusions on material issues, or draw conflicting inferences therefrom, then the motion for summary judgment must be denied.³⁷

5. Idaho Code § 45-501 declares that “[e]very person performing labor upon, or furnishing materials to be used in the construction ... of any ... building ... has a lien upon the same for the work or labor done.” The purpose of Idaho Code §§ 45-501 *et seq.* is to compensate persons who perform labor upon or furnish material to be used in construction, alteration, or repair of a structure.³⁸

6. Any person claiming a lien under Idaho Code §§ 45-501 *et seq.* must file a claim of lien in the office of the county recorder for the county in which the property or some part of it is situated.³⁹

7. The mechanic's lien statutes are liberally construed in favor of those to whom the lien is granted, and to create a valid lien the claimant must substantially comply with the statutory requirements.⁴⁰

8. Idaho Code § 45-507(3) includes a requirement that the claim of lien must contain “[a] statement of [claimant's] demand, after deducting all just credits and offsets.”

9. A lien is not invalidated simply because the claimant is not entitled to the amount claimed due in the claim of lien,⁴¹ even when the discrepancy is substantial.⁴²

³⁷ *Van v. Portneuf Medical Center*, 147 Idaho at 556, 212 P.3d at 986; *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009).

³⁸ *BMC West Corporation v. Horkley*, 144 Idaho 890, 893, 174 P.3d 399, 402 (2007).

³⁹ Idaho Code § 45-507.

⁴⁰ *BMC West Corporation v. Horkley*, 144 Idaho at 893-94, 174 P.3d at 402-03.

⁴¹ *Barber v. Honorof*, 116 Idaho 767, 769, 780 P.2d 89, 91 (1989); *Guyman v. Anderson*, 75 Idaho 294, 296, 271 P.2d 1020, 1021 (1954).

⁴² *Electrical Wholesale Supply Company v. Nielson* 136 Idaho 814, 824-25, 41 P.3d 242, 252-53 (2001) (lien held valid where claim of lien demanded \$51,571.00, and only \$1,069.2 was found to be due).

10. An enforceable contract requires “distinct understanding common to both parties.”⁴³ Acceptance of an offer must be unequivocal and identical to the offer made.⁴⁴ “The minds of the parties must meet as to all the terms before a contract is formed.”⁴⁵ Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties.⁴⁶

V. ANALYSIS

With regard to the Maglebys’ materialman’s lien upon the Cabin, the only objection ITP and Jenks Brothers pose is that they dispute the amount stated therein. The Idaho Supreme Court has held that a dispute as to the true amount owed to the lien claimant does not invalidate the lien. Therefore, no other objection to the Maglebys’ lien having been argued in opposition to the Maglebys’ Motion, the Maglebys’ lien upon the Cabin shall be foreclosed.

With regard to Count 2 of their Complaint, the Maglebys allege that Brandon Jenks asked Chris Magleby to manage the construction of the Cabin, from the drywall installation to the completion of the project.⁴⁷ Chris Magleby further alleges that “In exchange for my management time they told me that they would pay me one percent (1%) of the gross sales price when the [Cabin] was sold. I agreed.”⁴⁸ The Maglebys also

⁴³ *Potts Construction Company v. North Kootenai Water District*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005) [citing: *Hoffman v. S V Co.*, 102 Idaho 187, 189, 628 P.2d 218, 220 (1981)].

⁴⁴ *Potts Construction Company v. North Kootenai Water District*, 141 Idaho at 681, 116 P.3d at 11 [citing: *Turner v. Mendenhall*, 95 Idaho 426, 429, 510 P.2d 490, 493 (1973)].

⁴⁵ *Id.*

⁴⁶ *Potts Construction Company v. North Kootenai Water District*, 141 Idaho at 681, 116 P.3d at 11 [citing: *Thomas v. Schmelzer* 118 Idaho 353, 356, 796 P.2d 1026, 1029 (Ct.App.1990)].

⁴⁷ Affidavit of Chris Magleby in Support of partial Summary Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed January 21, 2010) (hereinafter the “Chris Magleby Affidavit”), at p. 2.

⁴⁸ Chris Magleby Affidavit, at p. 3.

contend that ITP and Jenks Brothers hired Jill Magleby to complete the interior design of the Cabin for one-half percent (1/2%) of the sales price.⁴⁹

Brandon and Anthony Jenks testified that although they discussed a 1% of sales price fee with Chris Magleby, the other partners of ITP did not formally accept this term. Furthermore, Anthony Jenks disavowed any agreement between ITP/Jenks Brothers and Jill Magleby. Construing these disputed facts in favor of ITP and Jenks Brothers, as is required by Idaho common law, the Maglebys have not shown the lack of a genuine issue as to any material fact

In particular, the Maglebys have not provided evidence of a distinct understanding common to both parties or that the minds of the parties met as to all the terms of either contract. Brandon and Anthony Jenks acknowledge an oral agreement with Chris Magleby, the terms of which are in dispute and not appropriate for summary judgment. Whether or not an oral contract existed between Jill Magleby and ITP/Jenks Brothers must also be determined by a preponderance of the evidence presented at trial. For these reasons, partial summary judgment as to the Maglebys' breach of contract claim shall be denied.

The Maglebys moved to strike paragraphs 7-10 of the affidavits filed by Brandon Jenks and Anthony ("Tony") Jenks.⁵⁰ Since the information in paragraphs 7-10 of the Brandon Jenks Affidavit⁵¹ and the Anthony Jenks Affidavit⁵² was not necessary for the analysis of the issues, the Magleby's Motion to Strike shall be denied as moot.

⁴⁹ *Id.*

⁵⁰ Motion to Strike (Partial), *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed February 17, 2010).

⁵¹ Affidavit of Brandon Jenks, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed February 8, 2010).

VI. CONCLUSIONS OF LAW

(1) Foreclosure of the Maglebys' materialmens lien is proper even though the amount owed to the Maglebys is in dispute.

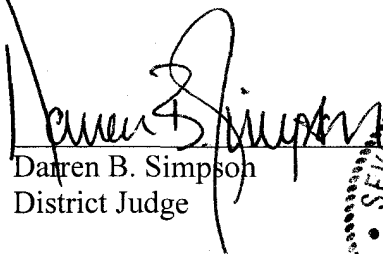
(2) A material fact issue exists as to the terms of the alleged oral contracts between the Maglebys and ITP/Jenks Brothers.

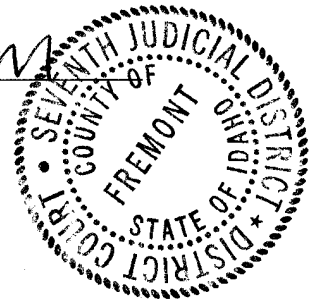
VII. ORDER

The Maglebys' Motion for Partial Summary Judgment, as it pertains to the foreclosure of their materialmans' lien upon the Cabin, is **granted**. Their Motion for Partial Summary Judgment, as it pertains to their breach of contract claim against ITP and Jenks Brothers, is **denied**. The Maglebys' Motion to Strike is **denied as moot**.

IT IS SO ORDERED.

DATED this 12TH day of July 2010.


Darren B. Simpson
District Judge



⁵² See: Anthony Jenks Affidavit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order Granting in Part Plaintiffs' Motion for Partial Summary Judgment was mailed by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 12th day of July 2010, to:

David A. Johnson, Esq.
Wright, Johnson, Tolson &
Wayment, PLLC
477 Shoup Ave., Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251



U.S. Mail



Courthouse Box



Facsimile

Kent W. Gauchay, Esq.
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Ave., Suite 200
P.O. Box 50484
Idaho Falls, ID 83405-0484



U.S. Mail



Courthouse Box



Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A.
Garner, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440



U.S. Mail



Courthouse Box

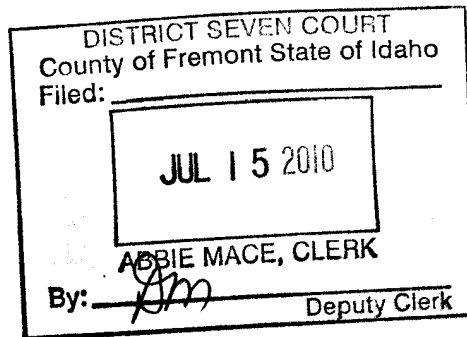


Facsimile

ABBIE MACE, Clerk of the Court

By: *Robert Freeman*

Deputy Clerk



David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**


Defendants.

Case No: CV-08-469

NOTICE OF SERVICE

David A. Johnson, attorney for Chris and Jill Magleby in the above-entitled matter, hereby gives notice that on July 14, 2010, Request for Inspection, together with a copy of this notice was served by facsimile on Joshua A. Garner, The Law Office of Joshua A. Garner at 359-5914 and Kent W. Gauchay, Simpson & Gauchay at 522-4295.

DATED: July 14, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on July 14, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name and Address

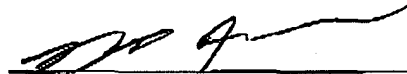
Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Method of Service

Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

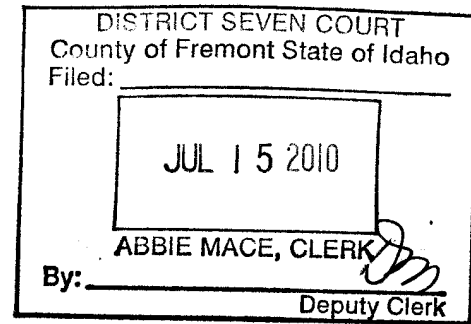
Facsimile: 359-5914



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No. CV-08-469

REQUEST FOR INSPECTION

David A. Johnson, attorney for Plaintiffs, requests Kevin and Tanya Garn, to allow inspection of the exterior and interior portions of the real property and all improvements located at 3635 Redtail Street, Island Park, Idaho (Subject Property), more particularly described as:

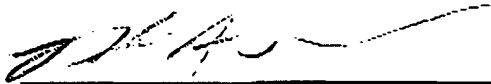
Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3,
Fremont County, Idaho

1- REQUEST FOR INSPECTION

and to provide a response to this Request for Inspection within thirty (30) days from the date of service herein, pursuant to Rule 34(a) of the Idaho Rules of Civil Procedure.

Plaintiffs or their agents, including a licensed appraiser(s) are intended to inspect, photograph, measure, etc. for a time period of approximately two hours.

DATED: July 14, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

Kent W. Gauchay I.S.B. #2709
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Avenue, Suite 200
P. O. Box 50484
Idaho Falls, Idaho 83405-0484
Telephone: (208) 523-2000

DISTRICT SEVEN COURT	
County of Fremont State of Idaho	
Filed:	
APR 10 2010	
ABBIE MACE, CLERK	
By: <i>DM</i>	Deputy Clerk

Attorneys for Defendants, Kevin Garn and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No. CV-08-469

**NOTICE OF TELEPHONIC
PARTICIPATION**

Defendant, Kevin and Tanya Garn, by and through their attorney of record, Kent W. Gauchay, of the law firm of Simpson & Gauchay, will participate in Mr. Garner's Motion to Withdraw as Attorney of Record, set before the court on August 20, 2010, at 13:00 a.m. by way of telephone call. Kent W. Gauchay will call the court at (208) 624-7401, at the time specified for hearing.

DATED this 9 day of April, 2010.

SIMPSON & GAUCHAY



Kent W. Gauchay
Attorney for Defendants

DOCUMENT
SCANNED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 9 day of August, 2010, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

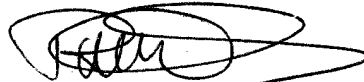
DOCUMENT SERVED: **NOTICE OF TELEPHONIC PARTICIPATION**

PERSON SERVED: David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment
477 Shoup Avenue, Ste 109
PO Box 52251
Idaho Falls, ID 83405

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, # 205
Blackfoot, ID 83221-1700

- ☐ Hand Delivered
- ☐ Mail
- ☐ Fax



Kent W. Gauchay
Attorney at Law

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

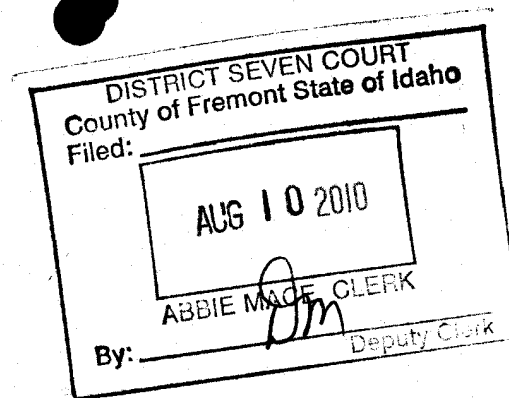
Case No: CV-08-469

**NOTICE OF INTENT TO APPEAR
TELEPHONICALLY and NOTICE OF
NO OPPOSITION**

David A. Johnson, attorney for the Plaintiffs in the above-entitled matter hereby gives notice to the Court and the opposing counsel that he attends to appear telephonically at the hearing scheduled for August 20, 2010, 10:30 a.m. before the Honorable Darren B. Simpson at the Fremont County Courthouse, St. Anthony, Idaho.

Notice is further given that the Plaintiffs have no objection to the Motion to Withdraw by the attorney for Idaho Trademark Properties, LLC., and Jenks Brothers, Inc., provided that the same not interfere with the currently scheduled date for trial. The

1-NOTICE OF INTENT TO APPEAR TELEPHONICALLY AND NOTICE OF NO OPPOSITION



DOCUMENT

Page 185 of 731
SCANNED

Court is requested to specify dates for withdrawing counsel to serve or mail pursuant to §11(b)(2) the Order of Withdraw.

DATED: August 6, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on August 6, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Facsimile: 359-5914

Honorable Judge Darren B. Simpson
501 N. Maple, #310
Blackfoot, ID 83221-1700

Facsimile: 785-8057



David A. Johnson, Esq.

2-NOTICE OF INTENT TO APPEAR TELEPHONICALLY AND NOTICE OF NO OPPOSITION

DISTRICT SEVEN COURT County of Fremont State of Idaho	
Filed:	
AUG 20 2010	
ROBBIE MACE, CLERK	
By: <u>DM</u>	Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

Christopher J Magleby, etal.

Plaintiff

CASE NO. CV-2008-0000469

vs.

MINUTE ENTRY

Kevin Garn, etal.

Defendant

THIS MATTER came before the Court on Friday, August 20, 2010, for the purpose of a TELEPHONIC STATUS CONFERENCE-MOTION TO WITHDRAW, the Honorable Darren B. Simpson, presiding.

Ms. Debby Mace, Deputy Court Clerk, was present. Ms. Sandra Beebe, Court Reporter was present.

David A. Johnson, Esq. appeared telephonically on behalf of Christopher and Jill Magleby dba Selective Builders. Josh Garner appears in person on behalf of Idaho Trademark Properties and Jenks Brothers.

Kent W. Gauchay, Esq., appeared telephonically on behalf of defendant Kevin Garn.

The court convenes. Unable to reach Mr. Johnson per telephone.

The court comments on Mr. Johnson filing no opposition to motion.

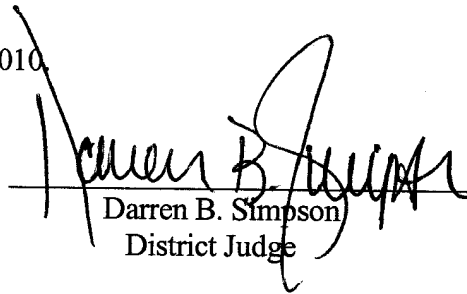
The Court comments on motion to withdraw. Mr. Gauchay has no objections. The Court will grant motion to withdraw. Will stay proceedings up to 20 days to effect service. The Court directs Mr. Garner to provide the Court with proof of service.

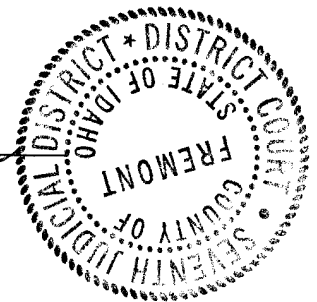
Mr. Gauchay asks as to hearings set for September. The Court states that will be stayed.

DOCUMENT
SCANNED

Court was thus adjourned.

DATED this 20TH day of August 2010.


Darren B. Simpson
District Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing **MINUTE ENTRY** was mailed by first-class mail, with pre-paid postage, sent by facsimile, or hand delivered this 20 day of August 2010, to the following:

David A. Johnson
477 Shoup Ave., Suite 109
P.O. Box 52251
Idaho Falls, Id. 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent W. Gauchay
P.O. Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

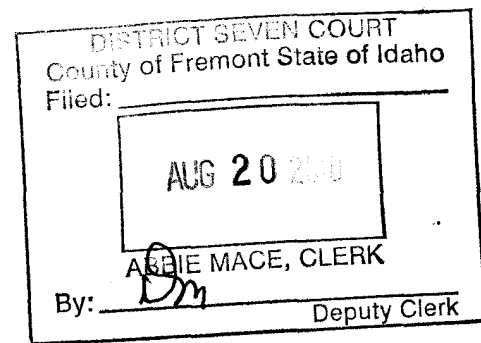
Josh Garner

Hand Delivered

ABBIE MACE, CLERK

By 
for Deputy Clerk

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
117 East Main
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420



Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

ORDER TO WITHDRAW AS
ATTORNEY OF RECORD

Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC, having moved the Court, pursuant to IRCP 11 (b) (2), for an Order allowing said firm and attorney to withdraw as counsel for the Defendants, IDAHO TRADEMARKE PROPERTIES, LLC, and JENKS BROTHERS, INC., in the above entitled action; and

WHEREAS, an affidavit has been filed showing good cause for the granting of such motion, and it appearing that the moving attorney has complied in all respects with the requirements of IRCP 11(b)(2), and said matter having come before this Court pursuant to the motion of the Defendants' attorney;

UPON REVIEW of the file and the Court being advised in the premises, now therefore,

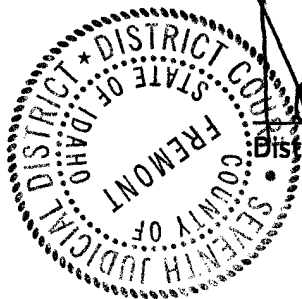
IT IS HEREBY ORDERED That **Joshua A. Garner and The Law Office of Joshua A. Garner, PLLC**, are hereby granted leave to withdraw as counsel for the named Defendants in the above entitled action.

IT IS FURTHER ORDERED That Defendants, **IDAHO TRADEMARK PROPERTIES, LLC**, and **JENKS BROTHERS, INC.**, shall appoint another attorney to appear, or shall appear in person by filing a written notice with the Court stating how he/it will represent herself, within twenty (20) days from the date of this order, and that no further proceedings will be had which would affect the rights of **IDAHO TRADEMARK PROPERTIES, LLC**, and **JENKS BROTHERS, INC.**

IT IS FURTHER ORDERED that if **IDAHO TRADEMARK PROPERTIES, LLC**, and **JENKS BROTHERS, INC.**, fail to file and serve an additional written appearance in the action, either in person or through a newly-appointed attorney within such twenty (20) day period, such failure shall be sufficient grounds for the entry of a default against it and for such further relief as the Plaintiff may be entitled to under the law and a dismissal of any pending action without further notice pursuant to the provisions of Rule 11(b)(3) of the Idaho Rules of Civil Procedure.

IT IS FURTHER ORDERED that the withdrawing attorney shall forthwith, with due diligence, serve copies of this order upon **IDAHO TRADEMARK PROPERTIES, LLC**, and **JENKS BROTHERS, INC.** and all other parties in this action. In the event the withdrawing attorney is unable to make personal service of such notice upon his client, as shown by the attorney's affidavit, attorney may make such service by certified mail to the last known address most likely to give notice to his client, which service shall be complete upon mailing.

DATED THIS 20th day of ~~July~~^{August}, 2010.



[Signature]
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{Aug}~~July~~ 20 day of 2010, I served a copy of the foregoing **ORDER TO WITHDRAW AS ATTORNEY OF RECORD**, by depositing a copy of the foregoing in the United States Mail, postage prepaid, in an envelope addressed to:

Deborah Mace
Clerk

The Law Office of Joshua A. Garner
P.O. Box 1014
Rexburg, Idaho 83440

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile to: (208)
☐ Overnight Mail

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile to: (208)
☐ Overnight Mail

Jenks Brothers, Inc.
c/o Brandon Jenks or Tony Jenks
2387 Little Town Drive
Rexburg Idaho 83440

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile to: (208)
☐ Overnight Mail

Idaho Trademark Properties, LLC
366 Talon Drive
Rexburg, Idaho 83440

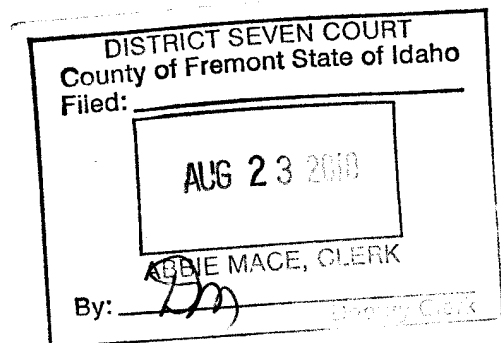
☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile to: (208)
☐ Overnight Mail

Kent Gauchay
497 North Capital Avenue
Idaho Falls, ID 83402

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile to: (208)
☐ Overnight Mail

Joshua A. Garner
 THE LAW OFFICE OF
 JOSHUA A. GARNER, PLLC
 117 East Main
 Rexburg, ID 83440
 Telephone: (208) 359-3181
 Facsimile: (208) 359-5914
 ISBN: 7420

Attorney for Defendants



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
 SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
 IDAHO TRADEMARK PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

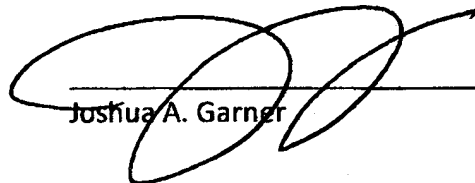
AFFIDAVIT OF SERVICE

STATE OF IDAHO)
)ss
 County of Madison)

I, JOSHUA A. GARNER, having been first duly sworn, depose and state that on the 20th day of August, I did cause a true and correct copy of the **Order to Withdraw as Attorney of Record**, ordered August 20, 2010 in the above-caption matter, to be mailed by certified mail to the last known address of Defendants, Jenks Brothers, Inc., and Idaho Trademark Properties, LLC, as demonstrated in the attached Exhibit "A" to this Affidavit. Exhibit "A" is a true and correct copy of certified mail receipts sent to the above-named Defendants at their last known addresses.

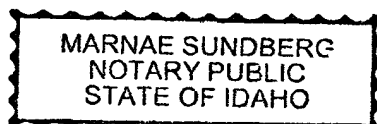
AFFIDAVIT OF SERVICE—Page 1

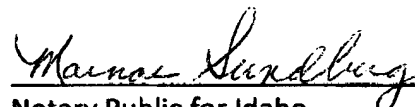
DATED this 20 day of August, 2010.



Joshua A. Garner

SUBSCRIBED AND SWORN TO before me this 20 day of August, 2010.





Notary Public for Idaho
Residing at Replung
Commission Expires: 11-15-2011

CERTIFICATE OF SERVICE

I hereby certify that on this 23 of August, 2010, I did cause a true and correct copy of the foregoing **AFFIDAVIT OF SERVICE** to be served upon the following by the indicated method.

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile to: (208)
☐ Overnight Mail

Kent Gauchay
497 North Capital Avenue
Idaho Falls, ID 83402

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile to: (208)
☐ Overnight Mail

Joshua A. Garner

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**


Defendants.

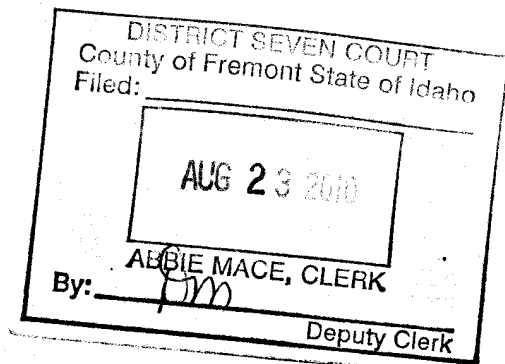
Case No: CV-08-469

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named Plaintiffs will call up for hearing their Motion to Compel on September 3, 2010, at the hour of 11:15 a.m., before the Honorable Darren B. Simpson, at the Fremont County Courthouse, St. Anthony, Idaho.

DATED: August 19, 2010


WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.



CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on August 19, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484


Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Facsimile: 359-5914

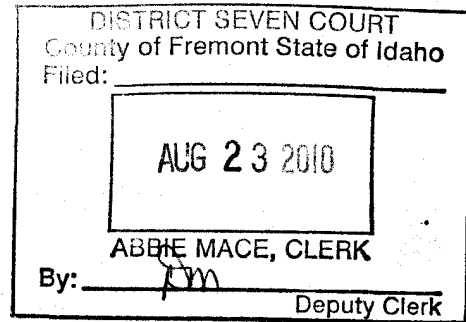
Honorable Judge Darren B. Simpson
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**MOTION TO COMPEL
RE: REQUEST FOR INSPECTION**

David A. Johnson, attorney for Plaintiffs, Chris and Jill Magleby, D.B.A. Selective Builders, hereby moves the Court for its Order compelling Defendants, Kevin and Tanya Garn, husband and wife, to allow the inspection of the real property which is the subject of this litigation as requested.

This Motion is brought pursuant to Idaho Rules of Civil Procedure 37 and is supported by the Affidavit of David A. Johnson, filed herewith.

The reasons for this Motion are:


1. Defendant's has failed to respond to the Plaintiff's Request for Inspection

1- MOTION TO COMPEL

that was requested on or about July 14, 2010.

2. Because of Defendant's failure to respond to the Plaintiff's requests, the Court is requested to impose appropriate sanctions, including awarding Plaintiff's attorney fees and costs associated with bringing this Motion, if Defendant's fails to respond to the Request for Inspection.

DATED: August 19, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on August 19, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

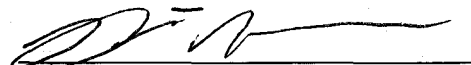
Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Facsimile: 359-5914

Honorable Judge Darren B. Simpson
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

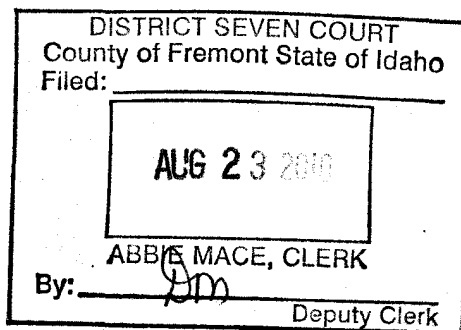
**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.



Case No: CV-08-469

**AFFIDAVIT IN SUPPORT OF
MOTION TO COMPEL**

STATE OF IDAHO)
 :ss.
County of Fremont)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.
3. On or about July 14, 2010, Plaintiffs served on Defendants his Request for

1-AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL

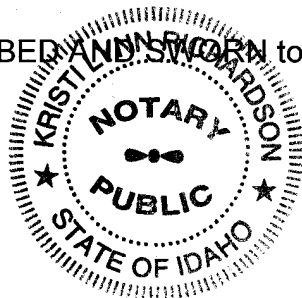
Inspection.

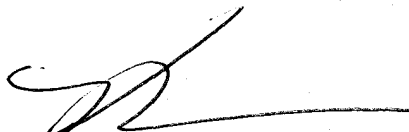
4. Attached hereto as Exhibit "A" is a true and correct copy of the Plaintiffs Request for Inspection.
5. Attached hereto as Exhibit "B" is a true and correct copy of the Plaintiffs Notice of Service dated July 14, 2010.
6. I have not received any answers or responses to either the interrogatories and requests.
7. On or about August 17, 2010, I faxed a letter to Mr. Gauchay stating I had not received any responses to my Request for Inspection and asked him to respond in 14 days. I have received no response to this letter. Attached hereto as Exhibit "C" is a true and correct copy of the facsimile report showing the date that it was faxed.

DATED: August 19, 2010


David A. Johnson

SUBSCRIBED AND SWORN to before me on August 19, 2010




Notary Public for Idaho
Commission expires: 1-2-13

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on August 19, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Method of Service

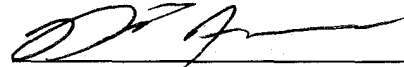
Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Facsimile: 359-5914

Honorable Judge Darren B. Simpson
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS,**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No. CV-08-469

REQUEST FOR INSPECTION

David A. Johnson, attorney for Plaintiffs, requests Kevin and Tanya Garn, to
allow inspection of the exterior and interior portions of the real property and all
improvements located at 3635 Redtail Street, Island Park, Idaho (Subject Property),
more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3,
Fremont County, Idaho

1- REQUEST FOR INSPECTION

EXHIBIT A

*Client
Fao 001*

and to provide a response to this Request for Inspection within thirty (30) days from the date of service herein, pursuant to Rule 34(a) of the Idaho Rules of Civil Procedure.

Plaintiffs or their agents, including a licensed appraiser(s) are intended to inspect, photograph, measure, etc. for a time period of approximately two hours.

DATED: July 14, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**


Defendants.

Case No: CV-08-469

NOTICE OF SERVICE

David A. Johnson, attorney for Chris and Jill Magleby in the above-entitled matter, hereby gives notice that on July 14, 2010, Request for Inspection, together with a copy of this notice was served by facsimile on Joshua A. Garner, The Law Office of Joshua A. Garner at 359-5914 and Kent W. Gauchay, Simpson & Gauchay at 522-4295.

DATED: July 14, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on July 14, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name and Address

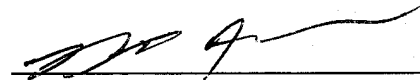
Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Method of Service

Facsimile: 522-4295

Joshua A. Garner
The Law Office of Joshua A. Garner, PLLC
24 South 1st West
Rexburg, ID 83440

Facsimile: 359-5914



David A. Johnson, Esq.

* * * Communication Result Report (Aug. 17. 2010 2:17PM) * * *

1)
2)

Date/Time: Aug. 17. 2010 2:16PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
7601 Memory TX	5224295	P. 2	OK	

Reason for error

E. 1) Hang up or line fail
 E. 3) No answer
 E. 5) Exceeded max. E-mail size

E. 2) Busy
 E. 4) No facsimile connection

David A. Johnson, P.A.**Wright, Johnson & Wayment, PLLC**

477 Shoup Avenue, Suite 109

P.O. Box 52251

Idaho Falls, Idaho 83405-2251

(208) 535-1000

(208) 523-4400 Fax

daj@ida.net

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 522-4295

To: Kent W. Gauchay
 Of: SIMPSON & GAUCHAY
 From: David A. Johnson
 Regarding: Magleby v. Garn, CV-08-469
 Date: August 17, 2010

DOCUMENTS	NUMBER OF PAGES
Letter	1

COMMENTS:

DAJ/nlc

* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US
 IMMEDIATELY AT (208) 535-1000.

EXHIBIT

fax oa
 Client
 8/17/10 TCC

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
September 2, 2010
AT 9:45 A.M. Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

AMENDED MINUTE ENTRY

This matter came before the Court on Friday, August 20, 2010, for the purpose of a Telephonic Status Conference – Motion to Withdraw, the Honorable Darren B. Simpson, presiding.

Ms. Debby Mace, Deputy Court Clerk was personally present. Ms. Sandra Beebe, Court Reporter was personally present.

David A. Johnson, Esq., appeared telephonically on behalf of Christopher and Jill Magleby dba Selective Builders. Josh Garner, Esq., appeared in person on behalf of Idaho Trademark Properties, LLC and Jenks Brothers, Inc. Kent Gauchay, Esq., appeared telephonically on behalf of defendant, Kevin Garn.

The Court convened and was unable to reach Mr. Johnson per telephone.

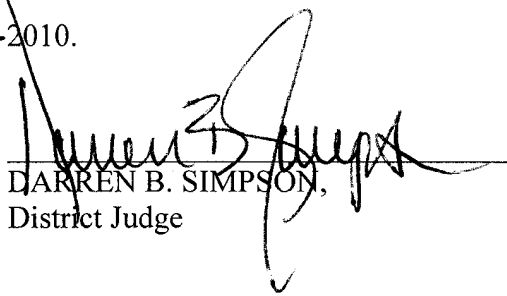
The Court commented on Mr. Johnson filing no opposition to the motion.

The Court commented on the Motion to Withdraw. Mr. Gauchay had no objections. The Court granted the Motion to Withdraw. This matter is stayed for a period not to exceed twenty (20) days after service of the Order of Withdrawal upon the Garns. The Court directed Mr. Garner to provide the Court with proof of service.

Mr. Gauchay inquired as to the hearings set for September. The Court stated the matters will be stayed.

Court was thus adjourned.

DATED this 19 day of Sept 2010.


DARREN B. SIMPSON,
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **AMENDED MINUTE ENTRY** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 19th day of Sept 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

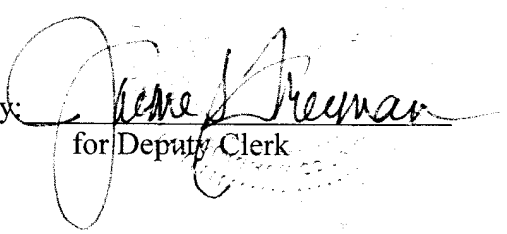
Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

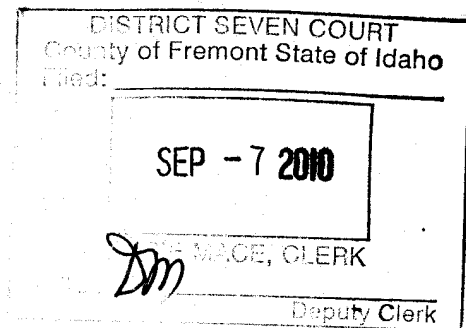
☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: 
for Deputy Clerk

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Ave., Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone 208.535-1000
Facsimile 208.523-4400
Idaho State Bar # 3319

Attorney for Plaintiff



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**PLAINTIFF'S WITNESS AND
EXHIBIT LIST**

Plaintiffs, Chris and Jill Magleby, by and through their attorney David A. Johnson,
hereby submit to the Court and to the opposing party, the following list of witnesses and
exhibits:

WITNESSES:

1- PLAINTIFF'S WITNESS AND EXHIBIT LIST

Name	Summary of Testimony
Agent/Record Custodian from Fremont County Planning and Building	To introduce Building Permit Application, Building Permit and related documents for 3635 Redtail St. Island Park Idaho. These documents identify Idaho Trademark Properties as owner and Jenks Brothers, Inc./ Brandon Jenks as agent of owner.
Gardner, Brady Idaho Trademark Properties	Member of ITP who was present for the discussions on hiring Chris and Jill and the amount of compensation. Agreed that ITP should be responsible for Chris's 1% and Jill's 0.5% of sales price. Involved in the Island Park cabin.
Garn, Kevin/Tanya Homeowner	Approved materials and designs selected by Jill. Was informed by Chris and Jill about the management fees and had conversations with Brandon Jenks on how they were going to pay the fees. Also testify about the matters and documents provided including the real estate transaction for the purchase of the Silverhawk property.
George Jenks Brothers Construction (former employee)	Helped manage project up to the sheet rock stage. Knew of Chris and Jill's duties to manage the project from the sheet rock stage to completion.
Hackworth, Jeff Torch Plumbing	Plumber who can testify that Chris and Jill managed the project. He also had conversations with Tony Jenks in the summer of 2008 in which Tony admitted owing Chris and Jill money for the management fees.
Harris, Marilyn Builders Design Center	Designer at Builders Design Center. Jill worked with her on having appliances delivered. The wrong dryer was delivered and Jill continued to work with her until June 2008 getting the correct dryer ordered and delivered.
Hoskins, Lois Wall 2 Wall Carpet	Carpet representative from Wall 2 Wall carpet who worked with Jill on selecting and ordering the carpet.
Jenks, Tony/Brandon	See transcripts of depositions and pleadings herein.
Magleby, Chris	All facts and circumstances regarding this matter including, but not limited to, work to be done and amount of compensation.
Magleby, Jill	All facts and circumstances regarding this matter including, but not limited to, work to be done and amount of compensation.

2- PLAINTIFF'S WITNESS AND EXHIBIT LIST

Name	Summary of Testimony
Rigg, Jim/Steve Extreme Siding and Trim	Siding installer who Chris scheduled to complete the exterior siding. Chris supervised his work and ordered materials for him as needed.
Ruth, Dan Dovetail Customer Cabinets	Cabinetmaker who worked with Chris and Jill on the design and installation of the cabinets and handrail. Was present on the job site when Brandon and Tony Jenks appeared to discuss with Chris the terms of the management fees.
Thomas, Blaine Classic Marble and Granite	Granite installer who worked with Chris and Jill on the granite selection, design, and installation.

EXHIBITS:

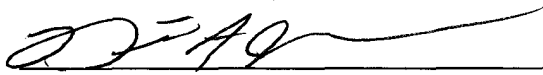
1	Claim of Lien
2	Proof of Mailing
3	Articles of Organization- Idaho Trademark Properties, LLC (September 25 2006)
4	Reinstatement Annual Report- Idaho Trademark Properties 12-10-2007
5	Operating Agreement of Idaho Trademark Properties, LLC
6	Fremont County building Permit
7	Emails (Jill Magleby, Tanya Garn & Ashley Mollette (8-27-2007 to 10-16- 2007)
8	Notes- Doors
9	Intermountain Wood Products Invoices
10	Idaho Wholesale Hardware, Invoices dated 11/3/07, 10/14/07
11	Notes- Plumbing Fixtures
12	Norandex Reynolds Customer Order dated 10/16/07
13	Carpet Concepts Invoice dated 10/16/07
14	Ferguson Enterprises Invoice dated 9/20/07

3- PLAINTIFF'S WITNESS AND EXHIBIT LIST

15	Handwritten notes
16	Dovetail Cabinets Bid Proposal dated 9/11/07
17	Falls Hardwood Floors stmt. (floor finishing) dated 10/3/07
18	AXNT Wood Products Invoice dated 10/4/07
19	Jill Magelby Hours
20	Chris Magelby Hours
21	Classic Marble & Granite
22	Steve Riggs
23	Wall 2 Wall documents/invoices
24	Bryce Lewis stmt.
25	Selective Cleaning stmt. Dated 11/26/07
26	Columbia Paint invoices
27	Selective Builder's Invoice dated 8/26/07
28	Selective Builder's Invoice dated 9/16/07
29	Selective Builder's Invoice dated 10/16/07
30	Selective Builder's Invoice dated 11/30/07
31	Selective Builder's Invoice dated 12/15/07
32	Real Estate Purchase and Sale Agreement (Idaho Trademark Properties, LLC & Garns)

Maglebys reserves the right to use any and all exhibits produced by either party in the past and all documents to be produced by either party in the future.

DATED: September 3, 2010


 WRIGHT, JOHNSON & WAYMENT, PLLC
 David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on September 3, 2010, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Person/Attorney Served:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Jenks Brothers, Inc.
c/o Brandon Jenks or Tony Jenks
2387 Little Town Drive
Rexburg, ID 83440

Idaho Trademark Properties, LLC
366 Talon Drive
Rexburg, ID 83440

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700


Method of Service:

Facsimile: 522-4295

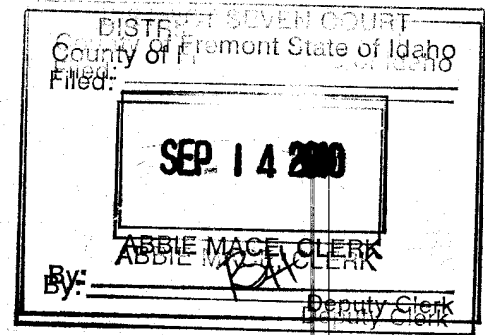
Mail

Mail

Mail



David A. Johnson, Esq.



David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

APPLICATION FOR DEFAULT

The Defendants, Idaho Trademark Properties, LLC and Jenks Brothers, Inc., having been properly served with the Order to Withdraw as Attorney of Record, and having failed to file an appearance and the time for filing such an appearance having expired, the Plaintiff hereby applies for entry of default against Idaho Trademark Properties, LLC and Jenks Brothers, Inc., and enter Judgment in favor of Plaintiff.


The addresses most likely to give the Defendants notice of such Default

Judgment are:

Idaho Trademark Properties
c/o Brady Gardner
366 Talon Drive
Rexburg, ID, 83440

Jenks Brother, Inc.
c/o Brandon Jenks
2387 Little Town Drive
Rexburg, ID 83440

DATED: September 13, 2010


WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on September 13, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Honorable Darren B. Simpson
Bingham County Courthouse
501 N. Maple, #310
Blackfoot, ID 83221-1700

Method of Service

Facsimile: 522-4295

Facsimile: 785-8057


David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

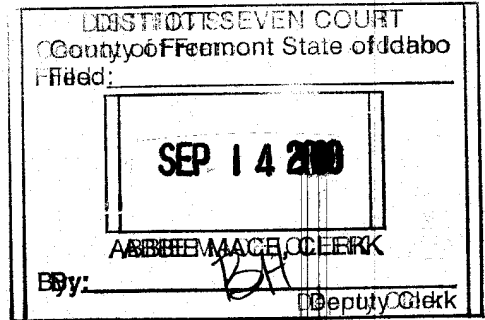
**AFFIDAVIT CALCULATING
INTEREST AND IN SUPPORT OF
ATTORNEY FEES AND COSTS**

STATE OF IDAHO)
 : ss.
County of Bonneville)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.

1-AFFIDAVIT



3. I am a citizen of the United States, over the age of 21 years, and that to the best of my knowledge and belief, Idaho Trademark Properties, LLC is an Idaho Limited Liability Company and Jenks Brother, Inc., is an Idaho Corporation. Neither are entitled to protection under the Soldiers' and Sailors' Relief Act of 1940, nor in any other Act of Congress, nor State Legislature duly adopted and approved. Plaintiffs hereby waive Notice of Service under rule 77(d).
4. The amount currently due Plaintiffs from Defendants Idaho Trademark Properties, LLC and Jenks Brother, Inc., is itemized as follows:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,533.00
Attorney's Fees	\$	14,904.00
Court Costs/Sheriff's Fees	\$	1,059.00
Total Judgment	\$	46,746.00
Less Amount Collected	\$	0.00
FINAL JUDGMENT	\$	46,746.00

5. Prejudgment interest in the sum of \$7,533.00 is owing as of September 13, 2010. Prejudgment interest was calculated as follows:

Date	Principal Balance	Interest Rate	Number of Years	Accumulated Interest
January 1, 2008 to September 13, 2010	\$23,250.00	12.00% per annum	2.70	\$7,533.00

6. I am the only attorney who performed work on behalf of Plaintiff. The charges in the attached Schedule of Attorney Fees (Exhibit A) are correct according to my knowledge, information, and belief. I have spent 74.52 hours in representing the

Plaintiffs in this action. The above hours are reasonable and necessary. A true and correct listing of the attorney fees and costs are attached hereto as Exhibit A.

7. My regular attorney fees are \$200.00 per hour, which rate is consistent with the prevailing rate for experienced attorneys similar to Plaintiff's attorney in the Eastern Idaho area.
8. I have also incurred the following costs related to the defaulting Defendants:

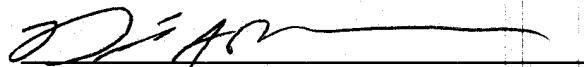
COSTS AS A MATTER OF RIGHT

Filing Fees: (Complaint)	\$88.00
Service of Process Fees- Idaho Trademark & Jenks	\$55.00
Total Mandatory	\$143.00

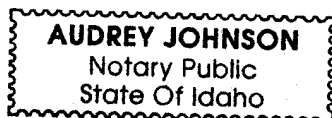
MISCELLANEOUS COSTS/DISCRETIONARY COSTS


9/30/2008	Filing Fee of Lis Pendens	\$3.00
5/13/2009	Mileage to and from St. Anthony	\$48.00
5/13/2009	Title Report	\$150.00
4/15/2010	Depositions of Jenks Brothers	\$715.00
	Total Discretionary	\$916.00

DATED: September 13, 2010


David A. Johnson

SUBSCRIBED AND SWORN to before me on September 13, 2010




Notary Public for Idaho
Commission expires: 3-10-15

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on September 13, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

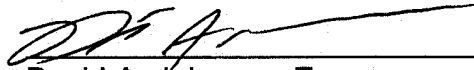
Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Honorable Darren B. Simpson
Bingham County Courthouse
501 N. Maple, #310
Blackfoot, ID 83221-1700

Method of Service

Facsimile: 522-4295

Facsimile: 785-8057



David A. Johnson, Esq.

Exhibit A

Plaintiffs' Attorney Hours

Magleby v. Idaho Trademark Properties, LLC et. Al Fremont County Case CV-08-469

Date	Time	Description
3/7/2008	2:30:00	Preparation of Document: Claim of Lien
4/18/2008	0:42:00	Evaluation of Credit Reporting Issues Telephone call to client concerning case Letter to Jenk Brothers, Inc.
8/21/2008	0:30:00	Office Conference with client
9/8/2008	2:42:00	Office Conference with client Preparation of Document: Complaint
9/9/2008		Filing Fee
10/31/2008	0:12:00	Review of Notice of Appearance from Jenks Attorney, Telephone call to client concerning case
11/4/2008	0:36:00	Review of Jenks Brothers Answers
	0:45:00	Review of filings, Telephone conference with client, Correspondence (via email) to Opposing Attorneys Garn and Ehardt
11/12/2008	2:00:00	Review correspondence from client. Correspondence (via email) to Opposing Attorney Garn Preparation of Document: Notice of Intent to Take Default Correspondence (via email) to Opposing Attorney Ehardt Preparation of Document: Interrogatories and Request for Production of Documents
11/14/2008	0:24:00	Review of Idaho Trademark Properties' answer email to client and atty Garn
12/19/2008	0:24:00	Telephone conference with Kent Gauchay email to clients
1/19/2009	0:30:00	Review of file Place telephone call to client
1/29/2009	1:30:00	Review documents received from opposing party including Anser and Cross Claim. Preparation of Document: Interrogatories and Request for Production of documents
2/3/2009	0:30:00	Review of Discovery Requested from opposing side, forward to client with instructions
2/4/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Producton of Documents
2/10/2009	1:30:00	Review of client Office Conference with clients to discuss case, discovery and gathering of facts.
2/27/2009	2:12:00	Preparation of Document: Answer to Interrogatories and Responses to Request for Production
3/6/2009	0:30:00	Prepare modifications to Answers to Interrogatories and Responses to Request for Production.
3/7/2009	0:18:00	Letter to opposing attorney regarding rule 37 compliance
3/31/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Production from Garns

5/13/2009		Title Search
5/14/2009	0:30:00	Office Conference with client to discuss case
7/6/2009	0:12:00	Conference with client regardless various issues
11/2/2009	1:40:00	Conference with client Letters to opposing attorneys to request dates for depositions and for IRCP 37 compliance for requiring supplemental answers to interrogatories and responses to request for discovery
11/30/2009	0:18:00	Review of file, Telephone call to client concerning case status
12/3/2009	0:30:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client Place telephone call to
12/14/2009	4:12:00	Conference with client Telephone conference with opposing attorney Garner Brief research Preparation of Document: Motion for Summary Judgment Preparation of Document: Affidavit of Chris Magelby Preparation of Document: Affidavit of Jill Magelby
12/16/2009	1:00:00	Prepare modifications to documents
1/12/2010	0:48:00	Prepare modifications to Summary Judgment documents, Set up hearing, Preparation of Document: Notice of Hearing
1/13/2010	0:30:00	Edit and modification of documents: Motion for Summary Judgment and Affidavits of Jill and Chris Magelby
2/1/2010	0:48:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client
2/8/2010	0:30:00	Review of Jenks response to Summary Judgment and Affidavits of Tony Jenks and Bradon Jenks
2/9/2010	0:18:00	Conference with client
2/16/2010	1:30:00	Review of file Place telephone call to Attorney Gauchay Place telephone call to Research - Sufficiency of Affidavits Review, Research issues raised by Jens Brothers Preparation of pleadings:
2/17/2010	0:24:00	Brief research on issue of insufficiency of lien based upon incorrect amount of claim Telephone call to client concerning case
2/23/2010	2:48:00	Preparation for Hearing Travel to St. Anthony (Split client) Court Appearance: Summary Judgment Hearing
2/26/2010	0:48:00	Telephone conference with client Letter to opposing attorney
3/8/2010	1:42:00	Prepare Subpoena for Jenks Brother Inc. Preparation of Document: Magleby's Second Set of Interrogatories and Request for Production of Documents
3/19/2010	0:36:00	Conference with Opposing Attorney Garn Telephone conference with client Prepare modifications to Notice of Depositions
3/29/2010	0:18:00	Review correspondence from client and Correspondence to Client via email
3/31/2010	3:36:00	Preparation for depositions Telephone conference with Fremont County Building Department Telephone conference with clients Review of Building Department Records
4/1/2010	1:12:00	Conference with client regarding deposition Final preparation
4/2/2010	3:48:00	Conference with clients Deposition of Brand Jenks Deposition of Tony Jenks

6-AFFIDAVIT

4/5/2010	0:30:00	Conference with Josh Gardner
4/6/2010	0:30:00	Preparation of pleadings: Note of Issue and Request for Trial Setting
4/15/2010		Deposition Costs for Tony and Brandon Jenks
4/21/2010	1:12:00	Preparation of Publication of Deposition of Tony Jenks, Start work on Publication of Deposition of Brandon Jenks
4/22/2010	2:30:00	Review of Deposition of Brandon Jenks, Preparation of Document: Partial Publication of Transcript of Dep. of Brandon Jenks Review of Summary Judgment Documents
5/18/2010	3:00:00	Preparation for Summary Judgment hearing
5/19/2010	1:30:00	Preparation for hearing
5/21/2010	4:24:00	Preparation for Oral Arguments Travel to and from St. Anthony Court Appearance: Motion for Summary Judgment
6/28/2010	0:30:00	Court Appearance - Status Conference
7/13/2010	0:48:00	Review of Summary Judgment Decision Telephone conference with client
8/4/2010	0:36:00	Review documents received from opposing party including Motion to Withdraw Preparation of Document: Notice of Intent to Appear Telephonically
8/13/2010	0:30:00	Letter to opposing attorney to comply with IRCP 37
8/18/2010	1:18:00	Preparation of pleadings: Motion to Compel and Affidavit
8/26/2010	1:00:00	Review Correspondence from opposing attorney Letter to opposing attorney with research of case
8/27/2010	1:00:00	Work on Settlement Letter
8/31/2010	2:36:00	Conference with client Brief Trial Preparation Preparation of Document: Witness and Exhibit List
9/1/2010	0:30:00	Edit and modification of document: Plaintiff's Witness and Exhibit List
9/2/2010	0:24:00	Review of documents from client, Telephone call to client concerning
9/3/2010	1:36:00	Prepare Hours of Work for Magleby's. Trial Preparation Prepare modifications to Plaintiff's Witness and Exhibit List
9/10/2010	3	Preparation of Default Documents, Calculation of Attorney Fees and Costs, and Interest
TOTAL	74.52	

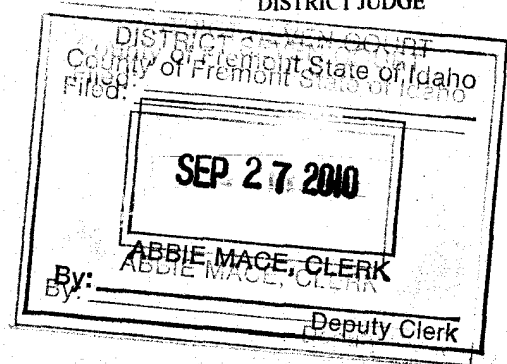
FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

AT

9/27/10

ORIGINAL

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE



David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

ENTRY OF DEFAULT

IN THIS ACTION Defendants IDAHO TRADEMARK PROPERTIES, LLC, and JENKS BROTHERS, INC., having been served with the Order to Withdraw as Attorney of Record dated August 20, 2010, which date is more than 20 days past notice pursuant to IRCP 11(b)(3), and said Defendants having failed to file an appearance or otherwise defend; it appearing that Defendants are not in the military service of the

1- ENTRY OF DEFAULT

United States; and upon application of Plaintiffs, the Default of said Defendants is hereby duly entered according to law.

DATED: September 21, 2010


Darren B. Simpson, District Court Judge

NOTICE OF ENTRY

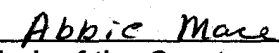
I CERTIFY that I am a clerk in the above-entitled court and that I mailed a true copy of the foregoing document(s) on September ___, 2010, to the following attorney(s) of record and/or parties:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Idaho Trademark Properties
c/o Brady Gardner
366 Talon Drive
Rexburg, ID, 83440

Jenks Brothers, Inc.
c/o Brandon Jenks
2387 Little Town Drive
Rexburg, ID 83440

David A. Johnson
Wright, Johnson & Wayment, PLLC
P.O. Box 52251
Idaho Falls, ID 83405


Clerk of the Court

By: 
for Deputy Clerk

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

AT

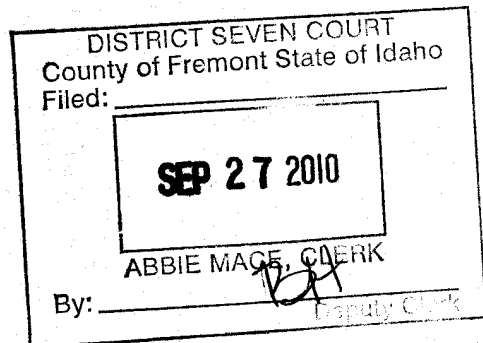
9/27/10

ORIGINAL

DARREN B. SIMPSON
DISTRICT JUDGE

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

DEFAULT JUDGMENT

Defendants Idaho Trademark Properties, LLC and Jenks Brothers, Inc., having been served with the Order to Withdraw as Attorney of Record dated August 20, 2010, and said Defendants having failed to file an appearance or otherwise defend; the time allowed by law for filing having expired; the default of Defendants in the premises having been duly entered according to law; and upon application of Plaintiffs, Judgment is hereby entered against Defendants Idaho Trademark Properties, LLC and Jenks

1- DEFAULT JUDGMENT

Brothers, Inc., in accordance with the Application for Default herein.

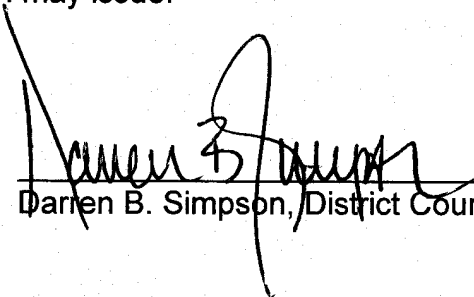
WHEREFORE, by virtue of the law, and by reason of the premises aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs shall have and recover from Defendants:

Principal Balance	\$23,250.00	
Accrued interest	\$7,533.00	
Attorney's fees	\$14,904.00	\$2,500.00
Court costs/Sheriff's fees	\$1,059.00	
Total Judgment	\$46,746.00	34,342
Less sum previously paid	\$0.00	
FINAL JUDGMENT	\$46,746.00	34,342

lawful money of the United States, with interest thereon at the lawful rate of interest from date hereof until paid, for which execution may issue.

DATED: September 21, 2010


Darren B. Simpson, District Court

NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled court and that I mailed a true copy of the foregoing document(s) on September ___, 2010, to the following attorney(s) of record and/or parties:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Idaho Trademark Properties
c/o Brady Gardner
366 Talon Drive
Rexburg, ID, 83440

Jenks Brothers, Inc.
c/o Brandon Jenks
2387 Little Town Drive
Rexburg, ID 83440

David A. Johnson
Wright, Johnson & Wayment, PLLC
P.O. Box 52251
Idaho Falls, ID 83405

Abbie Mace
Clerk of the Court

By: *[Signature]* Chustion
for Deputy Clerk

DISTRICT SEVEN COURT	
County of Fremont State of Idaho	
Filed: _____	
SEP 29 2010	
ABBIE MACE CLERK	
By: _____	Deputy Clerk

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**MOTION TO ALTER, AMEND OR
RECONSIDER**

Plaintiffs, Chris and Jill Magleby, (Maglebys), by and through their attorney, David A. Johnson, hereby move the Court to alter, amend or reconsider its denial or limitation of attorney fees as contained in the *Default Judgment* dated September 27, 2010. This Motion is brought pursuant to Idaho Rules of Civil Procedure 11(a)(1)(2)(b), 52(a), and 59.

1-MOTION TO ALTER, AMEND, OR RECONSIDER

Pursuant to the conference between the Court and the attorneys for Defendants, Kevin and Tanya Garn (Garns) and Maglebys, the Court indicated pursuant to IRCP 54(e)(4), that it was required to deny the award of most attorney fees incurred in this case. Maglebys respectfully submit that (a) IRCP 54(e)(4) is not applicable to the present request for attorney fees, and (b) if this rule is applicable to the present request for attorney fees, Maglebys have complied with the same.

I. IRCP 54(e)(4) does not limit attorney fees in a post-answer default.

Black's Law Dictionary defines "default judgment" as:

1. A judgment entered against a defendant who has failed to please or otherwise defend against the plaintiff's claim, often by failing to appear at trial.
2. A judgment entered as a penalty against a party who does not comply with an order, esp. an order to comply with a discovery request."

Black's Law Dictionary, 7th Abr. Ed, p. 341.

The former is also known as a "no-answer default judgment." The latter is known as a post-answer default judgment. IRCP 54(e)(4) deals with a no-answer default judgment. The present case is a post-answer default for failure to comply with the Court's order to have another attorney appear within 20 days and is not subject to the limitations of IRCP 54(e)(4).

IRCP 1(a) states that the Idaho Rules of Civil Procedure are to be "...liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." To deny attorney fees and costs in this case violates this rule of construction. The purpose of the law is to make injured persons whole. Requiring the Maglebys to absorb more than 80% of what they have incurred in reasonable attorney

2-MOTION TO ALTER, AMEND, OR RECONSIDER

fees, even though they are completely entitled to be made whole, is not justice. Further, the allowance of a guilty party to avoid liability for attorney fees by their attorney withdrawing at the eleventh hour or by requiring a trial to be held, further violates and conflicts with the purposes of the Idaho Rules of Civil Procedure.

IRCP 54(e)(4) requires that the request for attorney fees and *dollar amount in case judgment is entered by default* be stated in the complaint. The use of "default" in this context refers to the no-answer default. This requirement is to provide notice, as discussed below, to the defendants so that they will know if they do not defend what the judgment against them would be.

II. Maglebys have complied with IRCP 54(e)(4).

Maglebys' Complaint accurately set for the amount sought. The Complaint reads:

Despite demands by Maglebys to Defendant for payment made at least ten (10) days prior to the filing of this action, Defendant has refused and continues to refuse to pay said obligation. Maglebys have been required to retain an attorney to initiate and prosecute this action. Maglebys are entitled to recover their reasonable attorney's fees and Court costs of \$2,500.00, pursuant to Idaho Code §§ 12-120 and 45-513, *if uncontested further. If contested, the amount of attorney fees and Court costs awarded should be the actual cost of attorney fees and Court costs.*

This Complaint clearly establishes that if no answer is filed and default is taken, the amount of attorney fees would be \$2,500.00. No one can accurately predict the exact amount of attorney fees and costs that would be incurred in a case like this. The Complaint herein states that once contested, the "amount" prayed for is the actual amount incurred.

IRCP 54(e)(4) also states that "any award of attorney fees in default judgments is subject to the other provisions of this Rule 54(e)." IRCP 54(e)(5) states that "[a]ttorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs; provided, however, the claim for attorney fees and costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed." Maglebys' attorney provided and filed a sufficient affidavit to meet these requirements.

IRCP 54(e)(3) mandates the Court to consider various factors in awarding fees. The Court's present interpretation excludes proper consideration of these factors. The clear intent of the IRCP 54(e) is to award a reasonable amount of attorney fees, not create technical requirements that are not in the interest of justice.

IRCP 8(f) requires the Court to construe pleadings to do substantial justice. Idaho is a notice pleading state. *Mortensen v. Stewart Title Guar. Co.* 149 Idaho 437, 235 P.3d 387 (2010). The Complaint herein gave more than adequate notice as to what attorney fees and costs were requested. "A request for attorney fees should alert the other party as to the basis upon which attorney fees are requested, in order that the other party may have a sufficient opportunity to object." *Bingham v. Montane Resource Associates* 133 Idaho 420, 424, 987 P.2d 1035, 1039 (Idaho, 1999).

In discussing Idaho Code § 12-120(1) the Idaho Supreme Court has stated that this statute was intended to discourage litigation and to encourage early settlement by "requiring that the pleadings warn the parties that this statute will be invoked for mandatory attorney fees." *Cox v. Mueller* 125 Idaho 734, 737, 874 P.2d 545, 548

(Idaho, 1994). One of the basis for recovery of attorney fees in this case is Idaho Code §12-120(1) and (3). The goal in this case is the same—to provide notice and warning. In the present case the defaulting defendants knew that if they did nothing, the attorney fees would have been limited to \$2,500.00, but if they contested the complaint, other attorney fees and costs would be sought and obtained if successful. The Court, in *Cox v. Mueller* 125 Idaho 734, 737, 874 P.2d 545, 548 (Idaho, 1994), held that in pleading dollar amounts, it was adequate to plead “\$25,000.00 or less.” The sum certain of \$2,500.00 if no answer is filed and thereafter more attorney’s fees are requested if contested is adequate. A range of amount is sufficient.

The Court has now determined that: (1) Maglebys are entitled to judgment for the money owed to them (Pursuant to the Judgment entered on September 27, 2010) and (2) that Maglebys have a right to foreclose on the judgment (Pursuant to the Summary Judgment decision). Attorney fees are now mandated pursuant to Idaho Code §45-513.

IRCP 54(e)(4) is subservient to Idaho Code §45-513. IRCP 54(e)(8) reads:

The provisions of this Rule 54(e) relating to attorney fees shall be applicable to all claims for attorney fees made pursuant to section 12-121, Idaho Code, *and to any claim for attorney fees made pursuant to any other statute, or pursuant to any contract, to the extent that the application of this Rule 54(e) to such a claim for attorney fees **would not be inconsistent** with such other statute or contract.*

(Emphasis added)

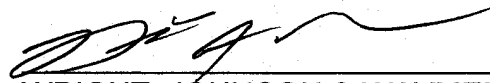
The Court of Appeals has specifically ruled that:

“To the extent that Rule 54(e) is inconsistent with I.C. § 45-513, we hold that the rule has no application and does not modify the statute. . . Thus, we conclude

that upon the successful entry of a judgment of foreclosure of a lien claimed under I.C. § 45-507, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. See Barber, supra. In determining the amount, the district court is free to consider the factors of I.R.C.P. 54(e)(3) as well as those considerations which are part of a prevailing party analysis under I.R.C.P. 54(d)(1)(B)." *Olsen v. Rowe* 125 Idaho 686, 689, 873 P.2d 1340, 1343 (Idaho App., 1994).

Based upon the above, the Court is requested to amend the Judgment to include all of Maglebys' attorney fees and costs as requested.

DATED: September 29, 2010



WRIGHT, JOHNSON & WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on September 29, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name & Address

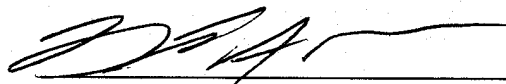
Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Honorable Darren B. Simpson
Bingham County Courthouse
501 N. Maple, #310
Blackfoot, ID 83221-1700

Method of Service

Facsimile: 522-4295

Facsimile: 785-8057



David A. Johnson, Esq.

September 30, 2010

AT 9:24 a.m.

DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

MINUTE ENTRY

This matter came before the Court on September 27, 2010, for the purpose of a
Telephonic Status Conference, the Honorable Darren B. Simpson, presiding.

Ms. Claudia Christian, Deputy Court Clerk was personally present. Ms. Sandra Beebe,
Court Reporter was personally present.

David A. Johnson, Esq., appeared telephonically on behalf of Christopher and Jill
Magleby dba Selective Builders. Kent Gauchay, Esq., appeared telephonically on behalf of
defendant, Kevin Garn.

Court and counsel discussed the issues remaining before the Court for trial.

Court trial remains scheduled for October 5, 2010, in Fremont County.

Court was thus adjourned.

DATED this 30th day of September 2010.

DARREN B. SIMPSON,
District Judge

DOCUMENT
SCANNED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MINUTE ENTRY** was personally delivered; faxed or mailed by first-class U.S. Mail with pre-paid postage on this _____ day of September 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☐ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☐ U.S. Mail ☐ Courthouse Box ☐ Facsimile

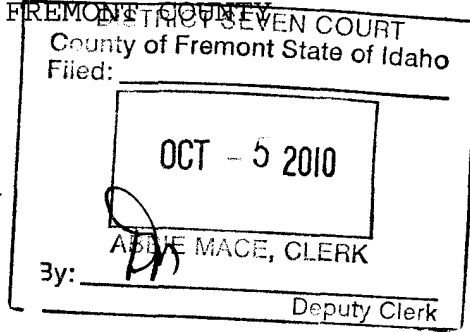
ABBIE MACE, CLERK

By: _____
for Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY
MINUTE ENTRY

STATE OF IDAHO)
Plaintiff,)
Vs.)
)
)
)
Defendant)
)

MINUTE ENTRY



JUDGE:	Darren B. Simpson
REPORTER:	Sandra Bebee
DATE:	October 5, 2010
CASE:	CV2008-469
CLERK:	Deborah Mace
HEARING:	Court Trial
ATTORNEY:	

DISK28

906 MAGLEBY VS GARN

907 APPEARING FOR PLAINTIFF IS MR. DAVID JOHNSON
908 APPEARING FOR DEFENDANT IS MR KENT GAUCHAY
THE COURT COMMENTS ON MOTION TO SET ASIDED DEFAULT
AND DEFAULT JUDGMENT.

MR JOHNSON PROCEEDS WITH ARGUMENT ON MOTION TO
SHORTEN TIME.
MR GAUCHAY ON REBUTTAL. STATES HE NEVER GOT A COPY
OF MOTION TO SET ASIDE. IS UNSURE OF WHICH PART OF
RULE MR JOHNSON IS RELYING ON. THE NEED TO RE NOTICE
TO DEFENDANTS. FEELS HE NEEDS TIME TO BRIEF THE
ISSUES.

911 MR JOHNSON RESPONDS TO NOTICE NEEDING TO BE GIVEN
EXPLAINS WHAT WAS PRESENTED TO THE COURT WAS DEFAULT
JUDGMENT. WAS APPROPRIATE. DOES NOT FEEL ANY FURTHER
NOTICE WAS NEEDED. WAS AWARE OF TODAY BEING DATE FOR
COURT TRIAL.

912 MR GAUCHAY GOES OVER RULES. THE COURT STATES RIGHT
NOW IT IS TRYING TO DETERMINE IF CAN EVEN SHORTEN
TIME.

916 THE COURT COMMENTS ON MOTION TO SHORTEN TIME.
917 NOTICE ON DEFAULT JUDGMENT IS PROVIDED TO PARTIES
WHOM JUDGMENT IS BEING ENTERED AGAINST. COMMENTS
ON NOTICE PROCEDURE.
DENY OBJECTION TO HEAR MOTION.
MR JOHNSON CAN ARGUE THE MOTION.
MR JOHNSON PROCEEDS TO ARGUE MOTION.

I hereby certify that the above is a true and accurate record of the hearing
minutes.

MARKED. MR JOHNSON ASKS CHRIS TO IDENTIFY EX. 4.
IDENTIFIES AS BUDGET WORKSHEET.

1005 MR GAUCHAY OBJECTS. HAS NOT BEEN ADMITTED.
MR JOHNSON MOVES FOR ADMISSION OF PL. #4. MR GAUCHAY
OBJECT. THE COURT WILL ADMIT PL. EX. #4.

1011 MR GAUCHAY OBJECTS TO LACK OF FOUNDATION AS TO TIME.
THE COURT SUSTAINS.

1033 MR JOHNSON ASKS FOR EX. #5 TO BE MARKED. WILL BE MARKED
AS PL.EX. #5 AND IS PROVIDED TO THE WITNESS.
THE WITNESS IDENTIFIES AS APPROX. HOURS ON DAILY BASIS
AT SILVER HAWK CABIN, THE GARNES HOME.
MR. JOHNSON MOVES FOR THE ADMISSION OF PL. EX.#5 FOR
ILLUSTRATIVE PURPOSES. MR GAUCHAY OBJECTS. THE COURT
WILL SUSTAIN.

1041 MR. GAUCHAY OBJECTS AS TO WITNESS TESTIFYING TO OPINION
MR JOHNSON FEELS TESTIMONY IS A MATTER OF WEIGHT.
- THE COURT WILL OVER RULE.
QUESTION IS WOULD WITNESS BE ABLE TO TESTIFY AS TO COST
OF POINT OF CONSTRUCTION WHEN FIRST TOOK OVER
MANAGEMENT. MR GAUCHAY CONTINUES TO OBJECT AND WANTS IT
NOTED. THE COURT STATES MR. JOHNSON IS ASKING THE
WITNESS TO GUESS AT THE PRICE OF THE HOME. MR JOHNSON
WILL RE PHRASE QUESTION.
MR GUACHAY CONTINUES TO OBJECT. LIKELY VALUE OF A HOME
IS NOT WHAT WE ARE HERE FOR TODAY.
MR. GUACHAY COMMENTS ON QUANTUM MERRITT. WITNESS CANNOT
COMMENT ON REAL ESTATE VALUE.
MR. JOHNSON COMMENTS ON MOTION TO COMPEL.

1048 MR JOHNSON MOVES FOR A CONTINUANCE AT THIS TIME TO
OBTAIN AN APPRAISAL. MR GAUCHAY OBJECTS.
THE COURT WILL TAKE A 10 MINUTE RECESS AT THIS TIME.

1123 BACK ON RECORD.
ISSUE OF TESTIMONY VALUE OF PROPERTY VALUE UNDER UNJUST
ENRICHMENT CLAIM. COURT SUSTAINING OBJECTIONS.
NO FOUNDATION LAID AS TO MR. MAGLEBY'S EXPERTISE
ON VALUE OF HOME.
THE COURT ADVISES MR. JOHNSON HE MAY NEED EXPERT
WITNESS. MR JOHNSON STATES THAT HAS BEEN ESTABLISHED
BY ADMISSION.
ASKS FOR CONTINUANCE TO GET OWNER OR REAL ESTATE
APPRAISER.
MR GAUCHAY COMMENTS. MAKES MOTION IN REGARD TO UNJUST
ENRICHMENT TO BE DISMISSED.
MR JOHNSON CLARIFIES, STILL FEELS MR MAGLEBY COULD
TESTIFY TO MARKET VALUE OF HOME.
THE COURT MOTION TO CONT. UNJUST ENRICHMENT IS DENIED
MOTION TO DISMISS AGAINST THE GARNES IS GRANTED.
OTHER ISSUE AS TO DEFAULT TO DEF. THE COURT DESIRES
BRIEF TO BE FILED.
MR JOHNSON WOULD LIKE TO CONT. WITH EVIDENCE.
MR. GAUCHAY FEELS IT WOULD MAKE FOR SENSE FOR BRIEFS TO

I hereby certify that the above is a true and accurate record of the hearing minutes.

BE FILED FIRST. THE COURT WANTS MR JOHNSON TO LAY
OUT ARGUMENTS AS TO COMPLAINT IN WHOLE.
BRIEF ISSUE WOULD BE BASED UPON INABILITY TO PRESENT
MATERIAL ISSUES IN UNJUST ENRICHMENT CLAIM AGAINST GARN
IS DENIED. BASED UPON INABILITY TO PRESENT MATERIAL
ISSUE IN UNJUST ENRICHMENT CLAIM AGAINST MOTION TO
DISMISS AGAINST GARN IS GRANTED.
CAN PROCEED WITH PRESENTATION WITH LIVE TESTIMONY
OR BY AFFD OF PARTIES DEFAULTED.
MR GAUCHAY IS NOT SURE IF HE WILL BRIEF ISSUES.
HAS CONCERN NOT TO FOR GO ANY LEGAL ARGUMENTS SO AS
NOT TO CAUSE A LARGER JUDGMENT FOR HIS CLIENTS.
THE COURT WILL ALLOW MR. JOHNSON TIME TO BRIEF.
WILL HAVE BY FRIDAY.
MR GAUCHAY AFTER RECEIVING COPY OF BRIEF, IF HAS
ARGUMENT MAY FILE BRIEF WITHIN 10 DAYS. MR JOHNSON
MAY HAVE 10 DAYS TO RESPOND OR FILE OBJECTION AFTER
MR GAUCHAY RESPONDS.
AFTER THE COURT MAKES RULING ON ISSUES AND BRIEFING
WILL NOTIFY COUNSEL.
THE COURT HAS ENTERED DEFAULT AGAINST IDAHO TR. AND
JENKS ESTABLISHING AMOUNT. ENTITLED TO AMOUNT IN
FORCLOSURE. ENTRY OF PREV. ORDER IS IN EFFECT.
MR GAUCHAY HAS NO QUESTIONS.
THE COURT ADDRESSES MR AND MS MAGELBY.
COURT CONCLUDES.

I hereby certify that the above is a true and accurate record of the hearing
minutes.

CV-2008-0000469

Christopher J Magleby, etal. vs. Kevin Garn, etal.

Hearing type: Court Trial

Hearing date: 10/5/2010

Time: 7:39 am

Judge: Darren B. Simpson

Courtroom:

Court reporter:

Minutes Clerk: MACE

Tape Number: Disk 28

Party: Idaho Trademark Properties, Attorney: Joshua Garner

Party: Christopher Magleby, Attorney: David Johnson

Party: Jill Magleby

COURT MINUTES

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; text-align: center;">OCT - 5 2010</div> By: <u>ADDIE MACE, CLERK</u> Deputy Clerk

909 COURT CONVENES

MR DAVE JOHNSON PROCEEDS WITH ARGUMENT ON MOTION TO SHORTEN TIME.

MR GAUCHAY COMMENTS ON NOT RECEIVING NOTICE FOR MOTION TO SET ASIDE. COMMENTS FURTHER ON UNCERTAINTY OF WHICH PART OF RULE MR JOHNSON IS RELYING ON. COMMENTS ON THE NEED TO RE NOTICE TO DEFENDANTS. MR. GAUCHAY FEELS THE NEED TO RE BRIEF THE ISSUES.

MR. JOHNSON RESPONDS TO THE ISSUE OF NOTICE NEEDING GIVEN TO DEFENDANTS AND WHY HE FEELS THAT WAS APPROPRIATE AND NO FURTHER NOTICE WAS NEEDED. MR. JOHNSON STATED PARTIES INVOLVED KNEW OF THE COURT TRIAL DATE.

MR. GAUCHAY GOES OVER RULES. THE COURT STATES THE ISSUE NOW IS TO DETERMINE IF IT CAN SHORTEN TIME.

THE COURT COMMENTS ON NOTICE OF DEFAULT JUDGMENT IS PROVIDED TO PARTIES WHOM JUDGMENT IS BEING ENTERED AGAINST. COMMENTS ON NOTICE PROCEDURE. STATES MR. JOHNSON CAN ARGUE MOTION.

MR JOHNSON PROCEEDS TO ARGUE MOTION TO SET ASIDE DEFAULT UNDER RULE 65(B). CLARIFIES SUB SECTION 1 AND 6.

THE COURT GOES OVER UNDERSTANDING OF RULE 65(B), COMMENTS ON FIRST COURT VS KELLER CASE LAW.

MR GAUCHAY FEELS THIS ISSUE IS HARD TO ARGUE. HE FEELS MR JOHNSON IS TRYING TO DO THE CASE OVER DUE TO NOT GETTING ATTORNEY FEES HE ASKED FOR. MR. GAUCHAY DOES NOT FEEL ANY REASONS UNDER 60(B) FIT.

ASKS FOR MOTION TO BE DENIED.

MR JOHNSON RESPONDS. IS TRYING FOR AN EXPEDITIOUS END TO THE CASE.

THE COURT COMMENTS ON RULE 60(B), RULE 55(C). GOES OVER ISSUE OF DEFAULTING PARTY NOT BEING PRESENT AND PROVISIONS BEING APPLICABLE. COMMENTS ON PARENTH. ONE NOT APPLYING.

THE COURT UNDERSTANDS THE QUANDRY OF ATTORNEY FEES.

MOTION TO SET ASIDED DEFAULT IS DENIED.

MR. GAUCHAY MAKES MOTION TO DISMISS. PROVIDES ARGUEMNT. GOES OVER MANOES VS MOSS CASE LAW. FEELS UNJUST ENRICHMENT NEEDS TO BE DENIED. MR. GAUCHAY MOVES FOR DISMISSAL OR AT LEAST HELD IN ABAYANCE.

THE COURT INQUIRES.

MR. GAUCHAY COMMENTS ON 109-737 CASE LAW AND FEELS MR. JOHNSON SHOULD HAVE BROUGHT UP ISSUES AND PUT IN WRITING BEFORE NOW. MR. GAUCHAY STATES HE DOES FEEL UNCOMFORTABLE NOT RAISING ISSUES BEFORE NOW AND PROCEEDS WITH HIS REASONING.

THE COURT ASKS AS TO DATE DEFAULT JUDGMENT WAS SIGNED. WAS SIGNED ON SEPT. 22.

MR. GAUCHAY STATES IT WAS MR. JOHNSON THAT SUBMITTED TO THE

COURT THAT THIS CASE WAS OVER.

THE COURT WILL TAKE UNDER ADVISEMENT THE MOTION TO DISMISS. MR. JOHNSON AND MR. GAUCHAY MAY SUBMIT BRIEFS.

MR JOHNSON WANTS TO GO OVER ISSUES IN COURT TRIAL. WANTS TO ARGUE RULE 56(D), SUMMARY JUDGMENT, ALSO CERTAIN ADMISSIONS IN THE COMPLAINT TO BE ESTABLISHED, PARAGRAPH 8 AND 13. THE ADMISSION OF THE PROPERTY BEING SOLD AND THE PRICE.

MR. GAUCHAY CLARIFIES HIS ANSWER.

THE COURT TRIAL PROCEEDS. MR JOHNSON CALLS MR. CHRIS MAGLEBY AS HIS FIRST WITNESS. MR. MAGLEBY IS SWORN AND PROCEEDS WITH TESTIMONY ON DIRECT. MR JOHNSON ASKS FOR PLAINTIFFS EX. #1 AND 2, TO BE MARKED. THESE ARE 2007 AND 2008 TAX FILING DOCUMENTS. THEY WILL BE ADMITTED UNDER NO OBJECTION FROM MR. GAUCHAY.

ALSO MARKED IS PL. EX. #3 AND #4. PL. EXHIBIT #4 IS IDENTIFIED AS BUDGET WORKSHEET OF THE PLAINTIFF. MR. JOHNSON MOVES FOR THE ADMISSION OF PL. EX. #4. MR. GAUCHAY OBJECTS. THE COURT WILL ALLOW PL. EX. #4 TO BE ADMITTED.

MR. JOHNSON ASKS FOR EX. #5 TO BE MARKED. WILL MARK PL. EX. #5.

THE WITNESS IDENTIFIES AS HOURS WORKED ON THE SILVER HAWK CABIN, THE GARN'S CABIN.

MR. JOHNSON MOVES FOR THE ADMISSION OF PL. EX.#5 FOR ILLUSTRATIVE PURPOSES. MR. GAUCHAY OBJECTS. THE COURT SUSTAINS.

MR GAUCHAY CONTINUES TO OBJECT AS TO WITNESS TESTIMONY AS TO VALUE OF PROPERTY. THE COURT WILL OVER RULE.

MR. JOHNSON PROCEEDS WITH DIRECT.

MR. GAUCHAY CONTINUES TO OBJECT, STATES WITNESS IS NOT AN EXPERT IN APPRAISALS AND PROPERTY VALUE.

MR. JOHNSON COMMENTS ON MOTION TO COMPEL.

THE COURT WILL TAKE A 10 MINUTE RECESS AT THIS TIME.

BACK IN SESSION.

THE COURT ADVISES MR. JOHNSON HE MAY NEED EXPERT WITNESS TESTIMONY AS TO REAL ESTATE VALUES. MR. JOHNSON STATES VALUE HAS BEEN ESTABLISHED BY ADMISSION.

MR. GAUCHAY MAKES MOTION AS TO UNJUST ENRICHMENT TO BE DISMISSED.

THE COURT WILL DENY CONT. ON MOTION AS TO UNJUST ENRICHMENT AND WILL GRANT MOTION TO DISMISS AGAINST THE GARNES.

THE COURT WILL ASK BRIEFS TO BE FILED. ALSO COMMENTS ON PROCEEDING WITH LIVE TESTIMONY OR AFFD. OF DEFAULTED DEFENDANTS.

MR. GAUCHAY EXPRESSES CONCERN OF FILING LEGAL BRIEF THAT WOULD CAUSE A GREATER JUDGMENT AGAINST HIS CLIENTS.

MR. JOHNSON IS TO SUBMIT BRIEF BY OCTOBER 8TH. MR. GAUCHAY WILL HAVE 10 DAYS TO RESPOND AND FILE BRIEF. MR. JOHNSON WILL HAVE ADDITIONAL 10 DAYS AFTER THAT TO FILE OBJECTION AFTER MR. GAUCHAY HAS RESPONDED.

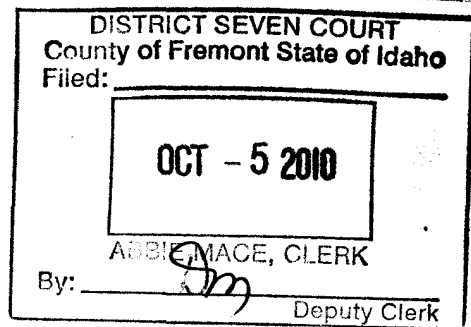
THE COURT WILL NOTIFY COUNSEL AFTER IT HAS MADE DECISION ON ISSUES.

THE COURT HAS ENTERED A DEFAULT AGAINST IDAHO TRADEMARK PROPERTIES AND JENKS BROTHERS ESTABLISHING AMOUNT. ARE ENTITLED TO AMOUNT IN FORCLOSURE. THE ORDER PREVIOUSLY ENTERED IS IN EFFECT.

THE COURT ADDRESSES MR. AND MRS. MAGLEBY.

COURT CONCLUDES

David A. Johnson, Esq.
Wright, Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**MOTION TO SET ASIDE DEFAULT
and DEFAULT JUDGMENT**

Plaintiffs, Chris and Jill Magleby, (Maglebys), by and through their attorney, David A. Johnson, hereby move the Court, pursuant to Idaho Rules of Civil Procedure (IRCP) 55(c) and 60(b), hereby moves the Court to set aside the Default Judgment entered on or about September 27, 2010 against Defendants Idaho Trademark Properties and, LLC and Jenks Brothers, Inc.

The reason for this Motion is the Default and Default Judgment was presented to the Court under the presumption or premise that the Court would award Plaintiff's full attorney fees and costs. Based upon the Court's construction of the Idaho Rules of

1-MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

Civil Procedure regarding default judgment, only a small fraction of attorney fees were awarded. Plaintiffs' desires to be made whole and receive a reasonable and fair amount from any judgment herein.

DATED: October 4, 2010


WRIGHT, WRIGHT & JOHNSON, PLLC
David A. Johnson

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 4, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name & Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

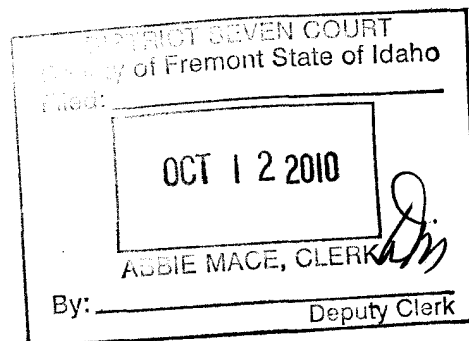
Facsimile: 522-4295

Honorable Darren B. Simpson
Bingham County Courthouse
501 N. Maple, #310
Blackfoot, ID 83221-1700

Facsimile: 785-8057


David A. Johnson, Esq.

David A. Johnson, Esq.
 Wright, Johnson, Tolson & Wayment, PLLC
 477 Shoup Avenue, Suite 109
 P.O. Box 52251
 Idaho Falls, ID 83405-2251
 Telephone (208) 535-1000
 Facsimile (208) 523-4400
 Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
 SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN,
 husband and wife, IDAHO
 TRADEMARK PROPERTIES, LLC,
 JENKS BROTHERS, INC., and DOES
 1-10**

Defendants.

Case No: CV-08-469

**MEMORANDUM IN SUPPORT OF
 MOTION FOR COSTS AND
 ATTORNEY FEES**

David A. Johnson, attorney for Plaintiffs, Chris and Jill Magleby, ("Maglebys")
 hereby submits the following memorandum of costs, disbursements and attorneys fees,
 in support of its Motion for Costs and Attorney Fees against the Defendants herein.

RIGHT TO ATTORNEY FEES AND COSTS

Foreclosure/Garns

1- MEMORANDUM IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY FEES

Idaho Code §45-513 mandates that the successful claimant is entitled to "the costs for filing and recording the claim, and reasonable attorney fees." Idaho Code §45-515 states that:

Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, equipment, materials or fixtures rented or leased or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

The Court's previous rulings limiting attorney fees against Idaho Trademark Properties LLC and Jenks Brothers, Inc., (collectively referred to as "ITP") does not limit attorney fees related to the Foreclosure claim and Defendants Kevin and Tanya Garn ("Garns"). Pursuant to Idaho Code §45-515, the Idaho Legislature has clearly indicated that there is the separate and distinct ability to pursue a personal action against the default contractor, in addition to any foreclosure action, which is what Maglebys chose to do in this case. Unlike ITP, Garns chose to file an answer and cross-claimed against ITP. Any limitations against a defaulting party as contained in IRCP 54(e)(4) do not apply to the foreclosure action and Garns.

The Court of Appeals has specifically ruled on this issue:

"To the extent that Rule 54(e) is inconsistent with I.C. § 45-513, we hold that the rule has no application and does not modify the statute. . . Thus, we conclude that upon the successful entry of a judgment of foreclosure of a lien claimed under I.C. § 45-507, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. See Barber, supra. In determining the amount, the district court is free to consider the factors of I.R.C.P. 54(e)(3) as well as those considerations which are part of a prevailing party analysis under I.R.C.P. 54(d)(1)(B)."

Olsen v. Rowe 125 Idaho 686, 689, 873 P.2d 1340, 1343 (Idaho App., 1994).

According to the law above, the amount of attorney fees regarding foreclosure is specifically determined by the factors IRCP 54(e)(3). Often is the case that the general contractors, who are contractually liable for the services they request, are not available to satisfy their contractual obligation; instead either being judgment proof or bankrupt. Idaho Courts have held that foreclosure actions can be pursued independent of the general contractor. *Acoustic Specialties, Inc. v. Wright* 103 Idaho 595, 601, 651 P.2d 529, 535 (Idaho,1982) (Subcontractor was entitled to costs and a reasonable attorney fee to be enforced against the landowner rather than the principal contractor.) See also, *Ivie v. Peck*, 495 P.2d 1110 (1972). "The purpose of these statutes is to compensate persons who perform labor upon or furnish material to be used in construction, alteration or repair of a structure." *Franklin Building Supply Co. v. Sumpter*, 139 Idaho 846, 850, 87 P.3d 955, 959 (2004). Materialman's lien laws are construed liberally in favor of the person who performs labor upon or furnishes materials used in the construction of a building. *BMC West Corp. v. Horkley* 144 Idaho 890, 893, 174 P.3d 399, 402 (Idaho,2007). "It is well settled that in lien foreclosure actions, the recovery of attorney fees is incidental to the foreclosure." *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.* 132 Idaho 754, 771, 979 P.2d 627, 644 (1999).

Maglebys were the prevailing party on foreclosure, not by default but by way of pursuing summary judgment. Any default judgment limitations regarding attorney fees do not apply and the Court is required to award reasonable attorney fees and costs to Maglebys as the prevailing party.

Attorney Fees pursuant to Idaho Code §12-123 (ITP).

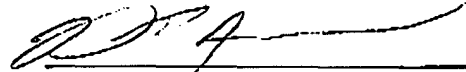
ITP should be required to pay attorney fees and costs pursuant to §12-123. This statute states that attorney fees are appropriate where the Court determines that any party has been effected by frivolous conduct. In the present case ITP engaged in conduct simply to delay the recovery of the money owed. Their apparent intent was to delay the entry of a judgment until such time as ITP properties were sold and they received proceeds from the same. Whether or not Maglebys would be paid was questionable. Some of the specific acts constituting frivolous conduct includes:

1. Denying material portions of the Complaint which should have been admitted. For example, ITP denied paragraph 9 of the Complaint wherein they denied approaching Maglebys and requested their services. In their subsequent depositions, Tony and Brandon Jenks subsequently admitted that such services were in fact requested. ITP also denied paragraph 11 of the Complaint which asserted Maglebys performed various work on the property. Tony and Brandon Jenks subsequently in deposition admitted that such substantial services and materials were provided.
2. Failing to properly answer interrogatories. Several interrogatories were propounded asking them to describe the contractual arrangement with Maglebys. ITP was evasive and non-compliant. For example, Interrogatory No. 5 asks ITP to, "describe all contracts, agreements, and understandings, between Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Chris and Jill Magleby dba Selective Builders that have been in place anytime during the last two years." ITP's response was,

"Defendants are currently unaware of any written contracts or agreements between Idaho Trademark Properties, Jenks Brother, Inc., and Chris and Jill Magleby dba Selective Builders that have been in place anytime during the last two years." The interrogatory did not limit the answer to written documents.

3. Filing evasive affidavits in opposition to summary judgment. The Court should note the Motion to Strike previously filed herein address the factual basis for this paragraph.
4. Arbitrarily choosing an amount that they assert Maglebys should be entitled to, preventing default. Thereafter, they failed to defend against the same.

DATED: October 12, 2010.



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson. Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 12, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address**Method of Service**

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Courthouse Box

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Garnder, Manager
366 Talon Dr
Rexburg, ID 83440

Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho

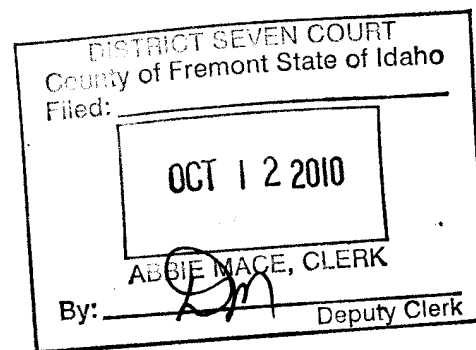
Mail

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Fax: 785-8057



David A. Johnson, Esq.



David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN,
husband and wife, IDAHO
TRADEMARK PROPERTIES, LLC,
JENKS BROTHERS, INC., and DOES
1-10**

Defendants.

Case No: CV-08-469

**MOTION FOR COSTS AND
ATTORNEY FEES**

Plaintiffs Chris and Jill Magleby (Maglebys), by and through their attorney, David A. Johnson, hereby move the Court for its Order granting them attorney fees and costs associated in prosecuting the above-captioned case.

Attorney fees are sought against Defendants Kevin and Tanya Garn ("Garns") pursuant to Idaho Code §45-513. Attorney fees are also sought against Defendants

1- MOTION FOR COSTS AND ATTORNEY FEES

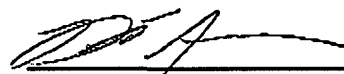
Idaho Trademark Properties, LLC and Jenks Brothers, Inc., (collectively referred to herein as "ITP") pursuant to Idaho Code §12-123.

The reasons for this Motion are:

1. Maglebys were the prevailing party pursuant to summary judgment and the recent proceedings. The default by ITP establishes the amount of principle owed, which Maglebys are entitled to collect, together with interest, costs, and reasonable attorney fees.
2. ITP's defense in this case has been frivolous as defined pursuant to Idaho Code §12-123. The same was not supported in fact or warranted under existing law. The defense was filed and pursued by ITP to frustrate the immediate collection of the money owed. After being pursued and still being unable to satisfy the obligation, ITP abandoned the defense of the case.

This Motion is supported by the Memorandum of Costs and Attorney Fees and Affidavit of David A. Johnson (Second) filed herewith.

DATED: October 12, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 12, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address**Method of Service**

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Courthouse Box

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

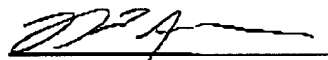
Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho

Mail

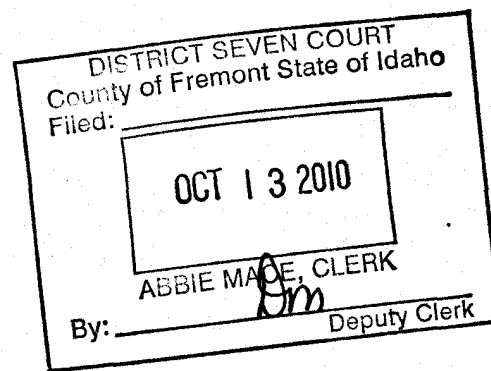
Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Fax: 785-8057



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**AFFIDAVIT OF DAVID A. JOHNSON
(Second) CALCULATING INTEREST
AND IN SUPPORT OF ATTORNEY
FEES AND COSTS**

STATE OF IDAHO)
 : ss.
County of Bonneville)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.
3. Attached hereto as Exhibit 1 is a true and correct copy of the Jenks Brothers,

1- SUPPLEMENTAL AFFIDAVIT OF CALCULATING INTEREST AND IN SUPPORT OF ATTORNEY
FEES AND COSTS

Inc.'s and Idaho Trademark Properties, LLC's Response to Plaintiff's Interrogatories and Request for Production of Documents.

4. Attached hereto as Exhibit 2 is a true and correct copy of the transcript of the deposition of Tony Jenks taken on April 2, 2010.
5. Attached hereto as Exhibit 3 is a true and correct copy of the transcript of the deposition of Brandon Jenks taken on April 2, 2010.
6. Attorney fees are requested pursuant to Idaho Code §§ 45-513, 12-120(3), 12-123, and IRCP 54.
7. The amount currently due Plaintiffs from Defendants Idaho Trademark Properties, LLC and Jenks Brother, Inc., is itemized as follows:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,643.83
Attorney's Fees	\$	20,184.00
Court Costs/Sheriff's Fees	\$	1,059.00
Total Judgment	\$	52,136.83
Less Amount Collected	\$	0.00
FINAL JUDGMENT	\$	52,136.83

8. Prejudgment interest above is based upon the previous calculations submitted to the Court as of September 27, 2010. Prejudgment interest was calculated as follows:

Date	Principal Balance	Interest Rate	Number of Years	Accumulated Interest
January 1, 2008 to September 27, 2010	\$23,250.00	12.00% per annum	2.739	\$7,643.83

9. I am the only attorney who performed work on behalf of Plaintiff. The charges in

2- SUPPLEMENTAL AFFIDAVIT OF CALCULATING INTEREST AND IN SUPPORT OF ATTORNEY FEES AND COSTS

the attached Schedule of Attorney Fees (Exhibit 4) are correct according to my knowledge, information, and belief. I have spent 100.92 hours in representing the Plaintiffs in this action. The above hours are reasonable and necessary. A true and correct listing of the attorney fees and costs are attached hereto as Exhibit 4.

10. My regular attorney fees are \$200.00 per hour, which rate is consistent with the prevailing rate for experienced attorneys similar to Plaintiff's attorney in the Eastern Idaho area.
11. I have also incurred the following costs related to the defaulting Defendants:

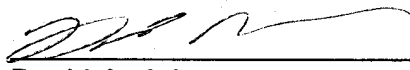
COSTS AS A MATTER OF RIGHT

Filing Fees: (Complaint)	\$88.00
Service of Process Fees- Idaho Trademark & Jenks	\$55.00
Total Mandatory	\$143.00

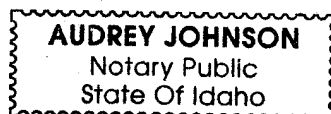
MISCELLANEOUS COSTS/DISCRETIONARY COSTS

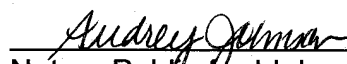
9/30/2008	Filing Fee of Lis Pendens	\$3.00
5/13/2009	Mileage to and from St. Anthony	\$48.00
5/13/2009	Title Report	\$150.00
4/15/2010	Depositions of Jenks Brothers	\$715.00
	Total Discretionary	\$916.00

DATED: October 12, 2010


David A. Johnson

SUBSCRIBED AND SWORN to before me on October 12, 2010




Notary Public for Idaho
Commission expires: 3/10/15

3- SUPPLEMENTAL AFFIDAVIT OF CALCULATING INTEREST AND IN SUPPORT OF ATTORNEY FEES AND COSTS

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 12, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Courthouse Box

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

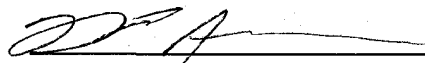
Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho

Mail

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Fax: ~~785-8057~~
mail


David A. Johnson, Esq.

RECEIVED

FEB 04 2009

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
24 South 1st West
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Defendants

Exhibit 1

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGELBY, D.B.A.
SELECTIVE BUILDERS,

Plaintiffs,

v.

KEVIN AND TANYA GARN, husband and wife,
IDAHO TRADEMARK PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10,

Defendant.

CASE NO.: CV-08-469

DEFENDANTS' RESPONSE TO PLAINTIFF'S
INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS

Defendants, JENKS BROTHERS, INC, and IDAHO TRADEMARK PROPERTIES, LLC, by and through their counsel of record, Joshua A. Garner of The Law Office of Joshua A. Garner, PLLC, and pursuant to Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure, hereby submit the following Responses to Plaintiff's Interrogatories and Requests for Production of Documents to Defendants.

GENERAL OBJECTIONS

GENERAL OBJECTION NO. 1: Defendants object to each and every discovery request to the extent that Plaintiffs attempt to impose requirements or obligations beyond those imposed by the Idaho Rules of Civil Procedure.

DEFENDANTS' RESPONSE TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS—Page 1

2-4-09

GENERAL OBJECTION NO. 2: Defendants object to each and every discovery request to the extent Plaintiffs' requests seek information protected by the attorney-client privilege information protected by the work product doctrine, or trial preparation materials protected under Rule 26 of the Idaho Rules of Civil Procedure or under any other valid privilege.

GENERAL OBJECTION NO. 3: Defendants object to each and every discovery request that seeks information that is irrelevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

GENERAL OBJECTION NO. 4: Defendants object to each and every discovery request to the extent that it is overly broad or unduly burdensome and oppressive such that the burden or expense of the proposed discovery outweighs its likely benefit.

GENERAL OBJECTION NO. 5: Defendants object to each and every discovery request to the extent it is ambiguous and too vague to adequately apprise Defendants of what information is being sought or to permit Defendants to furnish such information with reasonable effort.

GENERAL OBJECTION NO. 6: Defendants object to each and every discovery request to the extent it purports to impose a burden of disclosing information not readily available to Defendants and/or available to Plaintiffs.

GENERAL OBJECTION NO. 7: Subject to the foregoing objections and reservations, which are incorporated into Defendants' specific responses as if set forth at length therein, the following answers are provided based upon a review of matters to date. Defendants reserve the right to supplement their answers if and when additional information is obtained.

INTERROGATORIES

INTERROGATORY NO. 1: Please state the name, address and telephone number of each and every person answering or consulted with to answer these Interrogatories and responding to the Requests for Production.

RESPONSE: Brandon Jenks, 3680 West Mountain View Drive, Rexburg, Idaho 83440. (208) 65-8829.

INTERROGATORY NO. 2: Please state the name, address, telephone number, and a brief description of the expected testimony of each and every witness or potential witness you intend to call at any hearing or trial in this case.

RESPONSE: Brady Gardner, 366 Talon Drive, Rexburg, Idaho 83440; Chris Ferguson, 626 Cook Street, Rexburg, Idaho 83440; Brandon Jenks; Tony Jenks; Michael Ferguson, Chris Magelby, Jill Magelby.

Defendants reserve the right to amend their Response to Interrogatory 2 pursuant to any pre-trial order issued by the Court in this matter.

INTERROGATORY NO. 3: Please list and identify all exhibits which you intend or expect to introduce into evidence at any hearing or trial of this matter and state the name and address of the person presently in possession of such exhibits.

RESPONSE: Defendants have not determined the exhibits they may introduce at a hearing or trial of this matter. Defendants reserve the right to amend their response to Interrogatory 3 pursuant to any pre-trial order issued by the Court in this matter.

INTERROGATORY NO. 4: Please describe all contracts, agreements, and understandings, between Idaho Trademark Properties, LLC, and Jenks Brothers, Inc., that have been in place anytime during the last two years.

RESPONSE: Defendants are currently unaware of any written contracts or agreements between Idaho Trademark Properties, LLC and Jenks Brothers, Inc. for the last two years. Defendants reserve the right to amend their response to Interrogatory No. 4 when any contracts or agreements or understanding are identified.

INTERROGATORY NO. 5: Please describe all contracts, agreements, and understandings, between Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Chris and Jill Magleby dba Selective Builders that have been in place anytime during the last two years.

RESPONSE: Defendants are unaware of any written contracts or agreements entered into between Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Chris and Jill Magleby d/b/a Selective Builders during the past two years.

INTERROGATORY NO. 6: Please identify each and every reason why you believe Chris and Jill Magleby do not have a valid claim of interest, pursuant to Idaho Code 45-701.

RESPONSE: Upon information and belief, Plaintiffs do not have a valid claim of interest because they do not meet any of the qualifications for claiming a valid interest in the subject property as set out in Idaho Code 45-701.

INTERROGATORY NO. 7: Please describe the organization and ownership of Idaho Trademark Properties, LLC, including members, managers, and percentage of ownership of each member. Also describe who, in 2007, had the ability to make decisions on behalf of Idaho Trademark Properties, LLC, including hiring contractors for the Subject Property.

RESPONSE: See attached Operating Agreement of Idaho Trademark Properties, LLC.

INTERROGATORY NO. 8: Please state Jenks Brothers, Inc., involvement in the construction of the house or other improvements made to the property located on the Subject Property.

RESPONSE: Jenks Brothers, Inc., acted as the general contractor for building a house on the subject property. Jenks Brothers, Inc., was primarily responsible for construction of the home and hiring subcontractors.

INTERROGATORY NO. 9: Please describe all communications, including all conversations, letters, memorandums, emails and the like, between you and Chris and/or Jill Magleby related to the Subject Property.

RESPONSE: At this time, none of the Defendants are aware of any written communications between themselves and the Maglebys. The Defendants are not aware of e-mails from Chris or Jill Magleby. Jenks Brothers, Inc. is aware of invoices sent from Magleby.

INTERROGATORY NO. 10: Describe the services and materials you believe were provided by Chris and/or Jill Magleby, dba Selective Builders, associated with the Subject Property.

RESPONSE: With regard to the subject property, Defendants trimmed the house and did some finish work.

INTERROGATORY NO. 11: State each and every fact and reason that supports your allegation as stated in your Second Affirmative Defense, wherein you claim that Chris and Jill Magleby failed to register with the Idaho Contractor's Board.

RESPONSE: I have done a name search with the Idaho Contractors Board and was unable to find either Chris or Jill Magleby listed as registered with the Idaho Contractors Board. However, after further inquiry it appears that Chris Magleby may have been registered with the Idaho Contractors Board with his registration expiring on or about December 25, 2008.

INTERROGATORY NO. 12: State each and every fact and reason that supports your allegation as stated in your Fifth Affirmative Defense, wherein you claim that Chris and Jill Magleby are barred by the doctrine of unclean hands.

RESPONSE: Defendants are still developing their theory of the case at this time and will supplement their response to Interrogatory No. 12 prior to a trial of this matter or according to any pre-trial orders provided by the court in this matter.

INTERROGATORY NO. 13: State each and every fact and reason that supports your allegation as stated in your Sixth Affirmative Defense, wherein you claim that Chris and Jill Magleby claims are barred by the doctrines of waiver and estoppel.

RESPONSE: Defendants are still developing their theory of the case at this time and will supplement their response to Interrogatory No. 13 prior to a trial of this matter or according to any pre-trial orders provided by the court in this matter.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: A copy of all documents and potential exhibits which may be introduced by Jenks Brothers, Inc., at a hearing or trial of this matter.

RESPONSE: See attached documents. Defendants reserve the right to supplement their response prior to a trial of this matter and according to any pre-trial order issued by the court.

REQUEST NO. 2: A copy of all communications between Jenks Brothers, Inc., and Idaho Trademark Properties, LLC.

DEFENDANTS' RESPONSE TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS—Page 5

RESPONSE: None available.

REQUEST NO. 3: A copy of all communications, including emails, letters, invoices, statements, and other documents, exchanged between Jenks Brothers, Inc., and Chris and/or Jill Magleby.

RESPONSE: See attached documents.

REQUEST NO. 4: A copy of all invoices received by Jenks Brothers, Inc., from Selective Builders within the past 24 months.

RESPONSE: See attached documents.

REQUEST NO. 5: A copy of all construction documents in your possession related to the Subject Property.

RESPONSE: See attached documents.

REQUEST NO. 6: A copy of all documents related to Idaho Trademark Properties, LLC, including all operating agreements and other agreements, between any owners or managers, together with any meeting minutes, and other similar documents.

RESPONSE: See attached documents.

REQUEST NO. 7: A copy of all documents you relied on in answering the foregoing Interrogatories, to the extent the documents are not protected by privilege, including work-product and/or attorney-client privileges.

RESPONSE: See attached documents.

Dated this 02 day of February, 2009.

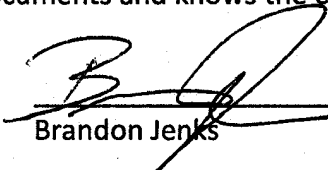

Joshua A. Garner

VERIFICATION

STATE OF IDAHO)
)ss
County of Madison)

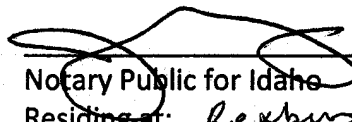
Brandon Jenks, being first duly sworn, deposes and says:

That he is a member of Jenks Brothers, Inc., and Idaho Trademark Properties, LLC., named entities in the foregoing action; that he has read the foregoing Response to Plaintiff's Interrogatories and Request for Production of Documents and knows the contents thereof.



Brandon Jenks

SUBCRIBED and SWORN to me this 02 day of February, 2009.



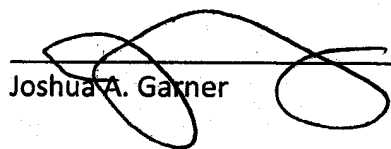
Notary Public for Idaho
Residing at: Reubing, ID
My Commission Expires: 10-00-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 02 day of February, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David A. Johnson
Wright Johnson Tolson & Wayment, PLLC
477 Shoup Ave. Suite 109
Idaho Falls, Idaho 83405

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile to: (208) 523-4400
☐ Overnight Mail



Joshua A. Garner

Transcript of the Testimony of **Anthony Jenks**

Date: April 2, 2010

Volume: I

Case: MAGLEBY vs. GARN, et al.

Printed On: October 12, 2010

T&T Reporting
Phone: 208.529.5291
Fax: 208.529.5496
Email: tntreport@ida.net
Internet: TandTReport@ida.net

Exhibit 2

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF
FREMONT

CHRIS AND JILL MAGLEBY, dba)
SELECTIVE BUILDERS,)
)
Plaintiffs,)
v.)
)
KEVIN AND TANYA GARN, husband) Case No: CV-08-469
and wife, IDAHO TRADEMARK)
PROPERTIES, LLC, JENKS)
BROTHERS, INC., and DOES 1-10)
)
Defendants.)
_____)

DEPOSITION OF ANTHONY JENKS

Friday, April 2, 2010, 11:45 a.m.

Idaho Falls, Idaho

Karla Steed

RPR, RMR, CSR

DEPOSITION OF ANTHONY JENKS

BE IT REMEMBERED that the deposition of Anthony Jenks was taken by the attorney for the Plaintiffs, at the offices of Wright, Johnson, Tolson & Wayment, PLLC, located at 477 Shoup Avenue, Suite 109, Idaho Falls, Idaho, before Karla Steed, Court Reporter and Notary Public, in and for the State of Idaho, on Friday, the 2nd day of April, 2010 commencing at the hour of 11:45 a.m., in the above-entitled matter.

A P P E A R A N C E S

For the Plaintiffs:

WRIGHT, JOHNSON, TOLSON & WAYMENT
BY: DAVID A. JOHNSON
477 Shoup Avenue, Suite 109
Post Office Box 52251
Idaho Falls, Idaho 83405-2251
(208) 535-1000
dj@ida.net

For the Defendants, Kevin and Tanya Garn:

SIMPSON & GAUCHAY
BY: KENT W. GAUCHAY
497 N. Capital Avenue, Suite 200
Post Office Box 50484
Idaho Falls, Idaho 83405-0484
(208) 523-2000
kgauchay@sglegal.net

A P P E A R A N C E S (cont'd)

For the Defendants, Idaho Trademark Properties,
LLC, Jenks Brothers, Inc.:
THE LAW OFFICE OF JOSHUA A. GARNER
BY: JOSHUA A. GARNER
24 South 1st West
Rexburg, Idaho 83440
(208) 359-3181

Also Present: Brandon Jenks
Chris Magleby
Jill Magleby

I N D E X
E X A M I N A T I O N

WITNESS

ANTHONY JENKS

EXAMINATION BY

PAGE

MR. JOHNSON5,54,73

MR. GAUCHAY 28,70

MR. GARNER 49

Reporter's Note: No exhibits.

1 (The deposition proceeded at 11:45 a.m. as
2 follows:)

3 ANTHONY JENKS,
4 produced as a witness at the instance of the
5 Plaintiffs and having been first duly sworn, was
6 examined and testified as follows:

7 EXAMINATION

8 BY MR. JOHNSON:

9 Q Would you please state your name.

10 A Anthony Nicholas Jenks.

11 Q Okay. I am going to take the
12 abbreviated version with you, if that's okay.

13 A Okay.

14 Q And for the record you probably need to
15 buy Brandon lunch because he had to bear the burden
16 today.

17 A I might have to.

18 Q You work it out with him. You were in
19 the deposition with him, or when I took his
20 deposition.

21 Is that correct?

22 A Yes.

23 Q Do you understand kind of the ground
24 rules that we use in depositions?

25 A Yes, I do.

1 Q And have you ever had your deposition
2 taken before?

3 A I have.

4 Q Under what circumstances was that?

5 A A land and property development case.

6 Q And were you a party to that case?

7 A Yes.

8 Q And what was the nature of that
9 conflict?

10 A It was a partnership agreement
11 conflict. We looked at a buy-in that never
12 happened. That is kind of where that went.

13 Q Was that in Jenks Brothers?

14 A No, a separate company.

15 Q Which state and county was that in?

16 A Bonneville County --

17 Q Okay.

18 A -- Idaho.

19 Q What was the outcome of that case?

20 A They dropped the case after the
21 depositions.

22 Q Okay. Now, did you listen carefully to
23 the questions and answers in the deposition of your
24 brother?

25 A Yes.

1 Q Is there anything that you would, can
2 recall that would differ from his testimony or your
3 recollection?

4 A On some questions there -- I was on
5 site more than he was, you know, checking on things
6 that could be, not a variation, but just a little
7 bit more detailed to possibly one or two questions
8 probably.

9 Q Do you recall what those questions
10 would be?

11 A This check here, the \$1,500 one.

12 Q That is Exhibit 4?

13 A Yes.

14 Q What is your recollection.

15 A The siding guys were going to pull off
16 the job unless they got paid, and Chris wrote them a
17 check, and this was a reimbursement to Chris to pay
18 them back. I got a phone call on a weekend so Brady
19 had that check and accounting wrote that.

20 Q Okay. Now let's go to what I see is
21 the center of this case; that is Magleby's
22 involvement on the Silverhawk property.

23 When was the first time that you had
24 any involvement with the Magleby's relating to
25 Silverhawk?

1 A Well, probably in that summertime, we
2 were trying to get the home done so we had worked
3 with them to come in and do a lot of the subcontract
4 work. Hopefully, it would speed it up. That's why
5 we began heading down that road with them.

6 Q What were the problems that you were
7 experiencing at that time?

8 A I was running the project at the time.
9 We had started a couple of other homes. And so
10 being split away, I felt confident with Chris that
11 things would turn out great when they got done, you
12 know, from my past experience.

13 Q Through your experience with the
14 Magleby's, as a whole, do you have any complaints
15 about their work?

16 A No.

17 Q Do they do good work?

18 A Yes.

19 Q Do you find -- have you found that
20 they've acted professionally?

21 A Yes. You know, there have been
22 different situations with ownership and
23 communication; that's the only thing that could have
24 gone better.

25 Q What do you mean by that.

1 A As far as between the ownership and
2 Magleby's; Idaho trademark Properties owners and
3 Magleby's.

4 Q Your brother talked about a lot of the
5 difficulties with the owners of Idaho Trademark
6 Properties.

7 Did you see Magleby's being involved
8 with causing any of the difficulties among the
9 various members of Idaho Trademark Properties.

10 A There was -- within the ownership we
11 had different thoughts and feelings on how things
12 should be done, and I would say Magleby's were in
13 the middle of that. And that would be the gist of
14 that.

15 I mean, I was not unhappy with anything
16 that they did. But there was: He said, she said
17 type conversations and trying to figure it all out.

18 Q Could you explain that a little bit
19 more. Who is the he and she proverbially that you
20 spoke about.

21 A You know, it's been awhile. The
22 recollection is -- there was the designer. There
23 was Chris. There was Brady. Everyone wanted to
24 give their input, but nobody had the final say on:
25 This is the way it is. So it was a lot of things

1 got left up in the air.

2 Q Was this the only project that you did
3 with the Ferguson's.

4 A No.

5 Q Had you done others prior to then?

6 A No.

7 Q Have you done any subsequent to then.

8 A Explain then.

9 Q Well, what has your involvement been
10 with the Ferguson's other than this project?

11 A We did other homes with them and
12 development.

13 Q Where at.

14 A Teton Springs, Idaho and Bonneville
15 County.

16 Q Okay. Teton Springs generally is
17 commonly known among attorneys.

18 A I am sure it is now.

19 Q How did that home turn out.

20 A Even worst than this did. Lost
21 everything we put into them.

22 Q Okay. And apparently Jenks Brothers
23 has pretty much gone out of business.

24 A Yes.

25 Q Do you attribute the loss of your

1 business -- and I am sure some of it is affected by
2 the economy as a whole -- but to the Teton Springs
3 and Silverhawk properties?

4 A Oh, definitely.

5 Q I mean, they were kind of the last
6 straw, nail in the coffin, whatever?

7 A Yes.

8 Q Were there management conflicts in the
9 Teton Springs matter as well.

10 A Yes.

11 Q So in conjunction with the Magleby's,
12 do you recall having any conversations specifically
13 with them and what their involvement would be in the
14 Silverhawk property?

15 A We had several conversations: You
16 know, this is kind of where we're headed leading up
17 to the start of the projects as it was moving
18 forward and going on.

19 I enjoyed working with them. I mean, I
20 was all for bringing them on to the project and
21 helping me out to make a great product for the
22 Garn's themselves.

23 Q Okay. You understand that they started
24 to work and provide the supervision as well as doing
25 some of the labor themselves?

1 A Yes.

2 Q All right. Prior to the time that they
3 started the supervision and doing the work, did you
4 visit with other members of Idaho Trademark
5 Properties about involvement of the Magleby's?

6 A Yes.

7 Q Tell me about that.

8 A They were -- I can't speak for them.
9 But they were under the impression that I was
10 supposed to do it all, myself on a project like that
11 and several other homes.

12 And that there should not be any
13 additional, you know, may be cost to it, or
14 whatever; that we could handle that. I spent my
15 time working there, a lot of it, while they were off
16 having fun or doing whatever they do.

17 I don't know.

18 Q Who is "they"?

19 A Chris, Brady and -- those two.

20 Q What I am detecting from your answer is
21 that those other three: Brady and the Ferguson's
22 wanted you and Brandon to do the work and everybody
23 share the profit?

24 A Yes.

25 Q So did you make any statements to Idaho

1 Trademark Properties that you had hired the
2 Magleby's to do the supervision?

3 A Yes. They knew they were working
4 there.

5 Q When was that knowledge conveyed to the
6 other members?

7 A When they began work there.

8 Q Did you have any conversations with the
9 Magleby's about how they would be compensated in the
10 summer of 2007?

11 A Yes.

12 Q What was that conversation --

13 First of all, where did it take place?
14 I know sometimes we combine conversations together,
15 but just describe it as best you can.

16 A We had several conversations. I mean,
17 I would see Chris on a weekly basis. I thought I
18 was working with the partners to get -- kind of
19 what we had done in the past. There was no set
20 agreement there.

21 But I told him I would do everything in
22 my power to get him taken care of.

23 Q Did you make any statements to the
24 Magleby's that you would handle it on a similar
25 basis than what you had done on other projects with

1 them?

2 A I believe there was a similar basis.
3 But saying, you know, this is what it's going to be;
4 I don't believe we ever had that final saying until
5 we had approval from the other partners.

6 Q Was there any conversation that their
7 compensation was subject to approval by the other
8 partners?

9 A I believe I lead on to that, yes.

10 Q Okay. Tell me how.

11 A Just in conversation saying: I will
12 get this approved from the other owners. We'll see
13 where -- what they have to say about moving forward.

14 Q Okay. But in the process did you ask
15 the Magleby's to immediately become involved?

16 A Yes. To do the project, yes.

17 Q Okay. Did you ever have any
18 conversations with the Magleby's in which
19 compensation would be something other than a
20 percentage basis?

21 A On one occasion, or several occasions I
22 told him if the others would not pay their portion I
23 would try to pay what I could out of my ownership in
24 the project.

25 Q Was that after the work had been done?

1 A During and afterwards.

2 Q So when would be the first time --
3 well, I am going to start over because I am
4 confused. Okay?

5 Say it again what you told them.

6 A I told Chris that I can't speak for the
7 other ones. But for my ownership I would do my
8 best. You know, if I got money back out of the
9 project from when I got paid, to get them current on
10 what they believe we had agreed on.

11 Q What was it that you agreed on?

12 A There was no separate figure because
13 there was no figure agreed on with the whole
14 ownership.

15 Q Was there any conversations you had
16 with the Magleby's that they would be paid either on
17 a fixed-price basis, an hourly basis or anything
18 like that?

19 A No. There was no fixed price set.

20 Q Would you agree that they are entitled
21 to some compensation for the Silverhawk project?

22 A Yes.

23 Q Do you have a figure that you have in
24 mind?

25 A I've had a figure in the past. But I

1 calculate the amount of work they did in that figure
2 of ten to \$15,000?

3 A No.

4 Q I mean -- I guess I am just trying to
5 get a grasp. Where does that number come from? Is
6 it just kind of a number out of the blue?

7 A That would be my assumption of the work
8 performed, what they had to do to get the work done.

9 Q Okay. You have not sat down and
10 said: Supervising the carpet laying, working for --

11 A No, it's not detailed.

12 Q Okay. Would you agree that on the
13 other projects that you paid a one and a half
14 percent.

15 A Yes, on the townhomes.

16 Q On the Riverwood Townhouses?

17 A Yes.

18 Q I think he also worked on your house,
19 your own personal house, did he not?

20 A Yes. I've had several homes that
21 they've done different things on.

22 Q Okay. Now with the Riverwood
23 properties, was there any interior decorating done?

24 A There was not interior decorating.

25 They picked out samples with us. I mean, they would

1 don't have -- essentially I lost everything I ever
2 put into the company. And I feel that at this point
3 it's time for life to move forward and lick our
4 wounds and move on.

5 Q I am not talking about what you're able
6 to pay. Okay?

7 I understand you had some dire
8 financial situations. But that is understanding.
9 My question is mostly on: Do you believe that there
10 is a figure that you believe that the Magleby's
11 should be paid, if possible, for their services, the
12 management portion of it?

13 MR. GAUCHAY: Object to the form.

14 THE WITNESS: I would say between ten
15 to \$15,000.

16 BY MR. JOHNSON:

17 Q What is that based on?

18 A The management and what they had to do
19 on the project as far as overseeing it.

20 Q Okay. I mean, is that based on a
21 formula? Is it a calculation of hours, or just --

22 A It's a number thrown out there that I
23 think would be a number that should be agreeable for
24 all parties.

25 Q Okay. Well, I am wondering: Did you

1 bring us samples and say we want that color of tile.

2 Q Okay. Are you familiar with Lorie
3 Fife.

4 A Yes.

5 Q Tell me what your knowledge is and how
6 she came about getting involved.

7 A I was working on the home. And Brady
8 and Chris had informed us that they found a lady
9 they wanted to bring in to do the interior design.

10 Q What was your thoughts on it at that
11 time?

12 A I thought they were wasting their
13 money.

14 Q So they did not want you to hire the
15 Magleby's to do the work, but apparently they felt
16 like they could hire an interior decorator?

17 A More or less.

18 Q Did they tell you what they were going
19 to pay her?

20 A I did not know the specific evaluation.
21 I don't know if there was ever a contract or a "set"
22 for her either.

23 Q Have you used interior decorators
24 before?

25 A No.

1 Q Do you know what a reasonable
2 compensation for interior decorators is?

3 A No, I don't.

4 Q Apparently Lorie Fife went away. How
5 did that come about?

6 A Well my understanding, Chris and Brady
7 had decided that -- and I was against it all
8 along -- that her services were no longer needed for
9 the most part. That's my understanding.

10 Q Okay. What about Jill Magleby: Do you
11 know how she became involved.

12 A Yes. Jill was -- I pushed to get Jill
13 involved to meet with the Garn's -- and Tanya was a
14 good fix -- to bring those two together to finish
15 the design of the house.

16 And it was my understanding where we
17 stopped and they started the design of the house
18 that the Garn's were paying her compensation to do
19 the work for them.

20 Q And what was that understanding based
21 on?

22 A Well, once we took the house over --
23 that was just what I thought was happening.

24 Q Okay.

25 A I mean, I never had a conversation with

1 either one saying -- but I knew they were meeting
2 and working on the house together.

3 Q Okay. So I am going to break that down
4 into a smaller bite.

5 Did you have any conversations or were
6 you present during any conversations in which
7 anybody approached Chris or Jill Magleby about Jill
8 doing the interior decorating work for this
9 property; the Silverhawk property?

10 A Yes.

11 Q Tell me about where and when that
12 conversation took place.

13 A We had met at the home in Silverhawk.

14 Q Who is the "we"?

15 A Jill, Chris, and Tanya I believe had
16 flown in to be at that conversation and to pick out
17 paint colors and do different things pertaining to
18 the house.

19 Q Okay. And you were present obviously?

20 A Yes.

21 Q Tell me about the conversation.

22 A At that point we were moving forward
23 with the house, finalizing paint colors, textures,
24 and you know getting what Tanya wanted done in the
25 house.

1 Q Okay. So do you know how it was that
2 Jill was at this meeting?

3 A Jill is a part of Selective Builders.
4 They were doing the painting. They were doing all
5 the flooring. They were involved in the cabinet
6 design. So they were working together on that to
7 get what the homeowner eventually wanted.

8 Q Okay. How did Jill become involved in
9 the interior decorating part?

10 A It was my understanding that Jill was
11 working with them. I heard this -- there was no
12 direct conversation with anybody -- that they had
13 been working with Tanya; that they were going to
14 help her.

15 They had known somebody here in Idaho
16 Falls for furniture, and working down that road, to
17 help put the house together and furnish it as well.
18 I don't have any direct conversation on that to
19 verify that.

20 Q Okay. And when was this conversation.

21 A I can't give an exact date. It would
22 have been during that time when they started in June
23 or July until the close of the home.

24 Q Okay. So sometime during that time
25 period?

1 A Yes.

2 Q But just to make sure, that took place
3 at the Silverhawk house?

4 A Yes.

5 Q And both Magleby's were there.

6 A Yes.

7 Q And that is Jill and Chris?

8 A Yes.

9 Q Tanya Garn was there?

10 A Yes.

11 Q You were there.

12 A Yes.

13 Q Any one else? I think you said Chris.

14 A (indicates). Chris Magleby.

15 Q There is a Chris Ferguson as well?

16 A It was Chris Magleby?

17 Q They were talking apparently about
18 paint, textures and all that kind of stuff.

19 A Yes.

20 Q And is that the only basis where you
21 thought that the Garn's had hired the -- or Jill
22 Magleby for interior decorating, or are there other
23 factors as well or facts?

24 A I guess I was under the understanding
25 that Jill actually had traveled to Utah and was

1 working with them on design and finalizing things as
2 the house was moving along.

3 So that was kind of where I got the
4 impression they were working for Tanya to finish up
5 some of these things and the interior decorating.

6 Q Do you recall doing anything to put
7 Tanya Garn and Jill Magleby together.

8 A Yes.

9 Q What was that?

10 A I had arranged that meeting to get
11 those two together to decide on those materials so
12 we could move forward with the home once we signed a
13 purchase and sale to move forward.

14 Q What was your reason for calling that
15 meeting or having the parties come together?

16 A So we could get Tanya and Kevin the
17 materials and design that they wanted in the home.

18 Q Get it done?

19 A Yes.

20 Q So how did you -- who approached Jill
21 Magleby to become involved in that meeting.

22 A I knew Selective Builders was doing the
23 work, the painting. So if they are going to paint
24 it, I just as soon have them as representatives of
25 picking out the materials and giving guidance on

1 paint colors and textures. They could be there and
2 help decide that.

3 Q I guess the way I'm looking at it: You
4 wanted to make sure that the Garn's were happy so
5 you could get the project done?

6 A Yes. Correct.

7 Q Do you know how Lorie Fife got out of
8 the picture?

9 A I believe Chris and Brady told her she
10 was done. And my understanding she was not happy.
11 But that was how I believe it happened.

12 Q Okay. Is there anything else that you
13 would call -- that you believe would be important
14 for us to know about the relationship with the
15 Magleby's and Idaho Trademark Properties and you as
16 in Jenks Brothers.

17 A No, I don't believe so.

18 Q Now on the Riverwood properties, would
19 Jill be involved with those particular projects?

20 A She was working as an employee of
21 Selective Builders and working on those projects,
22 painting and doing different things.

23 Q Did you see a difference in what work
24 Jill would do versus what Chris Magleby would do.

25 A In my experience with them, Jill would

1 do more of the high-end faux painting and different
2 things like that.

3 Q Okay. Now as far as Silverhawk -- I
4 don't want to combine different projects -- but the
5 Silverhawk property, did you see Chris and Jill
6 handle different aspects?

7 A Jill -- when we met with Tanya she put
8 the sample boards together.

9 Q As in Jill did?

10 A Yes. As far as the faux paintings and
11 different things that we installed in the house.

12 Q And what would Chris be doing.

13 A He worked more on the cabinet design,
14 you know, installing materials; doing a lot of the
15 main painting.

16 Q Would he be involved in supervising the
17 subs.

18 A The one main sub we had on there was
19 the siding guy which was his contact; and he
20 supervised that. The other work was self performed
21 by Selective Builders.

22 Q I mean like, for example, carpeting,
23 floor coverings.

24 A We worked with him. We picked out
25 materials and he did do scheduling on that.

1 Q Okay. So he would be in charge of the
2 installers.

3 A Yes. Arranging them to get there.

4 Q I think there are different types -- I
5 think there is some carpeting, correct?

6 A Carpet, yes.

7 Q Hardwood floor?

8 A Yes. They self-performed the hardwood
9 floor I believe.

10 Q Part of the countertops?

11 A Yes.

12 Q That would be Magleby's doing that?

13 A Yes.

14 Q As well as all the hardware and trim
15 would be the Magleby's?

16 A Yes.

17 MR. JOHNSON: Off record.

18 (off record)

19 MR. JOHNSON: Back on.

20 BY MR. JOHNSON:

21 Q Was Jill Magleby involved in the design
22 of the house in any way?

23 A I guess you better state what is
24 "design" when you say that?

25 Q Well, as far as interior decorating

1 what do you mean? What would you believe that would
2 include?

3 A Interior decorating: I would say the
4 motif of the home, the furniture, and you know
5 getting the furniture in the house and decorating
6 the house.

7 You know as far as the paint colors and
8 all, that was all decided by Tanya through Jill
9 creating samples and doing that.

10 Q Okay. Do you differentiate that from
11 the design of how the house is going to lay out,
12 floor plans and stuff --

13 A Yes. We worked with the -- with the
14 draftsman to design the house floor plan.

15 Q I mean like, for example, as far as the
16 lay out of the kitchen if it has islands; that type
17 of stuff.

18 A We had a plan drawn for that. Then
19 working with Tanya she made the ultimate decision on
20 how to do that; and they were present because they
21 had been working with the cabinet guy.

22 Q Okay.

23 MR. JOHNSON: Thank you. That's all
24 the questions I have.

25

EXAMINATION

1
2 BY MR. GAUCHAY:

3 Q Tony, did you ever meet personally with
4 the Garn's other than the meetings that you talked
5 about here?

6 A Yes, I did. When they originally looked
7 at the house.

8 Q Okay. Who was present?

9 A Dan Bridentine (phonetic), Brady
10 Gardner, Kevin Garn and Tanya Garn. I believe there
11 were their kids. I don't know that for sure.

12 Q Okay. When did that meeting take
13 place?

14 A I can't give you an exact date. It was
15 during the framing stage of the house. The house
16 had been framed.

17 Q Okay. Were the Magleby's part of the
18 project at that point.

19 A No.

20 Q You heard my questions to Brandon with
21 regard to records?

22 A Yes.

23 Q Do you know of any other records that
24 may exist relative to this particular project other
25 than those that Brandon has referenced.

1 A No.

2 Q Do you have any idea where these
3 records that Brandon mentioned, where they are
4 located?

5 A We have the computer. That is
6 Quickbooks. That's where I would start to look. We
7 have moved several times. I don't know exactly
8 where they are.

9 Q What about e-mails: Do you have any
10 e-mails relative to this project?

11 A I don't believe I have them any more.
12 I mean, there was e-mails, but I switched the
13 account. It's all done in the past.

14 Q Those e-mails would have been between
15 you and who do you think?

16 A Probably me and Brady mostly. Brady --
17 I can't recall exactly who I would have talked to
18 every day, or had conversations with during that
19 period.

20 Q Is it fair to say that of all the
21 principles in Idaho Trademark Properties you're the
22 one who spent the most time on site?

23 A Yes.

24 Q You indicated -- I think may be I heard
25 you say this -- that the project was behind. Is

1 that correct?

2 A (no response)

3 Q Was there a point where this was
4 behind, or did I mishear you?

5 A We were going to put it in the Parade
6 of Homes. We were behind on that. When Kevin and
7 Tanya purchased the home, that was off the table.

8 Q So what is your understanding exactly
9 of why the Magleby's were brought into this project?

10 A To finish up the project, that it would
11 be a quality that the Garn's would be happy with.

12 Q Were the Magleby's brought in before
13 the Garn's became interested in this property?

14 A It's right in that timeframe. I am not
15 sure if they -- if they started talking then or not.
16 We were right in that same point right when they
17 purchased the home, signed the purchase and sale.

18 Q Did Lorie Fife have anything to do with
19 the project not being completed as quickly as it was
20 anticipated?

21 A No.

22 Q What is the name of the siding
23 contractor?

24 A I believe it was Elite. I would have
25 to go back and look at the records. I can't confirm

1 that.

2 Q Were they a company located in Island
3 Park, or where were they?

4 A My understanding is the Idaho Falls
5 area.

6 Q You indicated that the Magleby's could
7 have had better communication between themselves and
8 Idaho Trademark Properties, correct?

9 A Yes.

10 Q And it sounds as if the whole basis of
11 any argument that there was a specific agreement is
12 based on prior practice, is that correct?

13 A I would say no to that statement.

14 Q Okay. But you had used them on Jenks
15 Brothers' projects before this condo project,
16 correct?

17 A Yes.

18 Q They had received a percent and a half.

19 A Yes.

20 Q They had never had any other projects
21 with Idaho Trademark Properties though, had they?

22 A No.

23 Q And the nature of what they were asked
24 to do with regard to this particular project was
25 different than what they had done with Idaho

1 Trademark Properties?

2 A Rephrase the question.

3 Q The responsibilities that the Magleby's
4 had in this particular instance was different than
5 it was with Jenks Brothers on your prior projects?

6 MR. JOHNSON: I'm going to object.

7 Leading.

8 MR. GAUCHAY: You can go ahead and
9 answer.

10 THE WITNESS: I am still confused with
11 your question.

12 BY MR. GAUCHAY:

13 Q Well, I will try to rephrase it. When
14 they -- when Magleby's did the work with Jenks
15 Brothers, you and your brother, on these condominium
16 projects -- they had certain responsibilities?

17 A Yes.

18 Q And you were building to a certain
19 quality type?

20 A Yes.

21 Q And you were in a certain price range

22 --

23 A Yes.

24 Q -- with the finished project?

25 A Yes.

1 Q Correct.

2 A Yes.

3 Q And that was much less than what we're
4 talking about here value-wise?

5 A Yes.

6 Q You heard your brother testify that he
7 thought that with regard to this type of project the
8 percentage would need to be different than it was
9 with your prior projects.

10 Is that correct?

11 A Yes.

12 Q Would you agree with that?

13 A Yes, I would agree.

14 Q And so the prior projects were one
15 point five percent is that correct?

16 A Yes.

17 Q Okay. Do you have a figure in mind or
18 a percent in mind as to what you believe would be
19 appropriate here?

20 A I believe we stated that earlier: Ten
21 to 15,000. A percentage is not -- it's not really
22 an option on that type of home where the sales price
23 is different than from what we did in the past.

24 Q Okay. And would you agree with me that
25 as we sit here today, there really was never a point

1 where there was a clear understanding or an
2 agreement as to what the Magleby's would be
3 compensated?

4 A Correct.

5 Q As far as you know there was never a
6 clear agreement between the principles of Idaho
7 Trademark Properties as to what the Magleby's would
8 be compensated?

9 A Correct.

10 Q But you do believe that the Magleby's
11 have done something that they should be compensated
12 for?

13 A Definitely, yes.

14 Q Okay. And you would agree with me that
15 they have already been paid something, correct?

16 A They have been paid for the services
17 provided on the actual line items for subcontracts
18 that they fulfilled in the house, yes.

19 Q Do you know exactly how much the
20 Magleby's have been paid.

21 A I don't know that figure right now.

22 Q And are you aware that the Garn's paid
23 the Magleby's some funds?

24 A I don't know anything about that.

25 Q Okay. Are you aware that the Magleby's

1 performed services for the Garn's after the close of
2 the sale?

3 A I was under that impression. I can't
4 confirm anything.

5 Q Okay. And are you aware that the
6 Magleby's executed a release of lien with regard to
7 work that was performed after the closing?

8 A I don't know that.

9 Q Okay. During the construction phase of
10 this home was there any deviation from the plans
11 that you were given to follow.

12 A Not on the construction. On the
13 interior pertaining and Kevin's request.

14 Q So the outside of the home, as far as
15 the roof line is concerned and all of that, there
16 were no deviations from the plans that you were
17 presented?

18 A Correct.

19 Q Okay. And those plans came from --

20 A A Plus Drafting.

21 Q Where is A Plus Drafting located?

22 A Rexburg, Idaho.

23 Q Had you used that particular firm in
24 the design of any of your other projects or homes?

25 A Yes.

1 Q Did you ever have any discussions with
2 them concerning problems with this particular home?

3 A No.

4 Q You are aware that there were some
5 problems that developed after the closing of the
6 home during the first winter of ownership by the
7 Garn's?

8 A Yes, due to non-maintenance.

9 Q Okay. Is that your opinion as to the
10 cause of the problem is non-maintenance.

11 A Yes. The majority of the problems were
12 non-maintenance.

13 I entered the home in January. It was
14 32 degrees inside the home because they did not plow
15 the driveway so they could fill the propane.

16 I notified them of that to try to help
17 them out.

18 Q Do you know whether or not the Garn's
19 had a property manager helping them take care of the
20 property at that time?

21 A I have no understanding of that.

22 Q When the sale closed and my clients
23 purchased the home there some sale proceeds, is that
24 correct?

25 A The only proceeds I recall was the

1 property, lot 22, that we received when we closed on
2 the home.

3 Q Okay. Did you pocket any money from
4 the sale of this home.

5 A No. I lost money in the home.

6 Q Okay. I mean, on the day of closing
7 did you receive a check, or did you receive any
8 funds, or did Idaho Trademark Properties actually
9 get a check?

10 A I can't recall right now. I would have
11 to go back and look at the records from the closing
12 statement.

13 Q When you testified that you intended,
14 or hoped, to make it right with the Magleby's with
15 regard to the services that they were performing out
16 of your own funds if need be; what did you mean by
17 that.

18 A If I got paid from the work I performed
19 on the job I would try and do what I could to give
20 them part of my percentage.

21 Q Would it be fair to say that that's an
22 indication that there was confusion or uncertainty
23 as to exactly what the Magleby's were to receive in
24 the way of compensation.

25 A Yes. I appreciated the work they did.

1 I thought nobody else would do -- I would do my best
2 personally to make it right with them.

3 Q And as you sit here today, I mean, do
4 you still feel that way.

5 A I would love to make it right, but I
6 have no means of doing that. Everything I've made
7 in the last ten years are in the homes and
8 everything that I have lost.

9 Q Do you -- would you believe that it
10 would be made right with the Magleby's if they
11 received another ten to 15,000?

12 A Yes.

13 Q You don't know of any agreement or
14 written agreement that existed between Idaho
15 Trademark Properties and the Magleby's?

16 A There is no agreement.

17 Q Were there any written agreements with
18 anyone who worked on this project?

19 A Nope.

20 Q Let me ask you this question, if you
21 could answer it please: Do you know when the sale
22 price was established?

23 A We met them initially within -- from my
24 initial contact with them, it was a couple of weeks
25 later, and I believe we agreed on a sales price. I

1 don't have a date on that. I would have to look at
2 the purchase and sales.

3 Q Could you give me some rough idea of
4 when that would have been?

5 A Had to be during the time of framing.
6 We'll look at the purchase and sales. That's when
7 the agreement started.

8 Q You heard the questions that I posed to
9 your brother --

10 A Yes.

11 Q -- in his deposition?

12 A Yes.

13 Q Is there anything that you would --
14 that he said that you disagreed with?

15 A I don't have specific items. I can't
16 recall exactly without -- I wouldn't say I totally
17 disagree with him, no.

18 Q That is probably an unfair question in
19 some ways. But so as you sit here and listen to his
20 testimony and what he said, there was nothing that
21 you have a recollection of that he said that you
22 felt at the time "I disagree with that"?

23 A No, not entirely. Nothing, no.

24 Q Okay.

25 A Not disagree with. But may be lack of

1 information, may be because he was not present or
2 anything else.

3 Q Okay. With regard to the operation of
4 Jenks Brothers, is that an LLC or is that a
5 corporation?

6 A It's a corporation.

7 Q And I think Mr. Johnson indicated that
8 he was going to take Brandon's deposition first
9 because he saw his name on more things. I never sat
10 and counted.

11 But is it fair to say that he took care
12 of more of the day-to-day business operations of the
13 corporation than you did?

14 A Yes.

15 Q But it would not be fair to say that he
16 was more familiar with this particular project than
17 you?

18 A Correct.

19 Q Were there other problems with
20 construction, during the construction phase, of this
21 project.

22 A When you say "problems" --

23 Q We know that -- for example, you said
24 that the siding guys left the project. They
25 apparently were not getting paid, so they pulled off

1 the project.

2 That is the explanation you gave for
3 the \$1,500 check. Were there other problems?

4 A Nothing out of the ordinary from normal
5 construction.

6 Q Okay. And were there -- why was there
7 so much disagreement then between the principles of
8 Idaho Trademark Properties if this project is
9 running pretty much like any other project?

10 A Jenks Brothers was self performing
11 labor. And the other gentlemen in the ownership had
12 no idea -- never had built a thing before.

13 We started the project in the middle of
14 the winter. The budget was tighter as we moved
15 forward trying to build up there in the winter in
16 Island Park.

17 Their lack of understanding. They did
18 not understand what the costs were in Island Park.

19 Q What is Brady Gardener's profession.

20 A He is a teacher now.

21 Q What was he at the time of this
22 project?

23 A I don't know if you would call it an
24 entrepreneur -- I don't know.

25 Q Who put this together? I mean, who

1 got you guys together and said: Let's do this.

2 A Brady purchased one of my old homes.

3 And from there -- he is friends with Chris. Mike is
4 Chris's dad. From there we formed the LLC.

5 Q And who formed the LLC? Did you have
6 an attorney do that? Or how was that done? Do you
7 recall?

8 A I don't recall.

9 Q Okay. Have you seen the operating
10 agreement?

11 A Initially, yes. I know we had one
12 done. I had seen that.

13 Q Okay. And do you recall any
14 discussions with any of the principles that this was
15 not being followed with regard to this project?

16 A We had meetings, but there was no:
17 This is the operating agreement. We're not
18 following that exactly. Nothing of that extent.

19 Q Okay. Were any of those discussions
20 heated.

21 A Yes.

22 Q Okay.

23 Does one of them stand out in your mind
24 as being more heated than the others?

25 A They were all tense once they had felt

1 like we had spent more than what the budget was.

2 Than when they began to do an audit, there was

3 definitely a division there.

4 Q What was the outcome of the audit?

5 They owed us money. And then it went away. Instead

6 of us owing them \$50,000. They owed us \$50,000.

7 Nobody ever talked about it again.

8 That was basically my money I had paid

9 the subs as we went along.

10 Q When you formed this LLC, did anybody

11 make any capital contribution? Put money into it?

12 A No -- that is not true. There was

13 different projects in the LLC that there was

14 contribution toward. But as far as funding the LLC,

15 I can't recall exactly.

16 I am sure there were recording fees and

17 different things. I am not sure who put that money

18 in.

19 Q Okay. Do you know -- I am sorry. May

20 be I missed the answer to this. But was there an

21 attorney involved in the creation of this?

22 A I can't recall who set that up.

23 MR. JOHNSON: Counsel, if I can

24 interject. I believe Greg Ehardt, I think.

25 THE WITNESS: He had left and done a

1 different thing. So I believe he was the
2 registered agent. But, you know, what he
3 recollects, I can't speak for him either.

4 BY MR. GAUCHAY:

5 Q Do you remember the specifics of any
6 discussion with regard to the Magleby's involvement
7 in this project?

8 A With?

9 Q The other principles.

10 A We had -- as Jenks Brothers we moved
11 forward and hired him. There was definitely a
12 discussion of moving forward. And there was some
13 dismay of the partnership. But it was never, you
14 know, a yes or a no. It was agree or disagree.

15 Q Which of the principles seemed to have
16 the most difficulty with the concept of the
17 Magleby's involvement in this project?

18 A Mike Ferguson.

19 Q Where did Brady Gardner stand on the
20 issues?

21 A As we started I believe he was for it.

22 Q Did Chris side with his dad, or where
23 was he at on it?

24 A He did not know enough about anything
25 to make a decision.

1 Q To the best of your understanding does
2 Idaho Trademark own anything other this one lot --

3 A No.

4 Q -- in Island Park.

5 A No. There was no other property
6 assets.

7 Q And is it your understanding that there
8 is an agreement as to at some point that lot will
9 sell, hopefully, and as to how the sale proceeds
10 would be distributed?

11 A The way it sits now, my understanding
12 it would be divided into ownership. Mike Ferguson
13 would tell you a different story because he is going
14 to tell you he is the one who lost everything. And
15 he would just string us out in litigation to try to
16 get what he can.

17 Q Is that what he has told you?

18 A That's what we ran into on other
19 projects.

20 Q Have you actually had litigation with
21 him, or against him?

22 A No, just threats.

23 Q Do you have an understanding of whether
24 there was an agreement when that lot sells that some
25 of the proceeds would be used to pay to the

1 Magleby's?

2 A There is no agreement between the
3 partnership.

4 Q When you say "the partnership", you
5 mean Idaho --

6 A Idaho Trademark Properties.

7 Q Your brother did not seem to know
8 whether it was being actively marketed at this
9 point. What is your understanding?

10 A Mike Ferguson owns the subdivision with
11 his father. So it's not in his best interest to
12 sell that lot. So I don't believe it's being
13 actively marketed.

14 Q Is anyone else -- or any of these
15 principles utilizing the name of Idaho Trademark
16 Properties at this time?

17 A I don't believe so.

18 Q I am not sure that Mr. Johnson asked
19 you, but where do you live?

20 A Rexburg, Idaho.

21 Q And where are you employed now?

22 A In Utah.

23 Q Where at.

24 A Salt Lake.

25 Q For whom.

1 A Westates Construction.

2 Q What are you doing for Westates
3 Construction?

4 A Project manager.

5 Q What type of construction do they do?

6 A Multi-family homes.

7 Q So you drive to Utah and have a place
8 to stay down there?

9 A I live with my in-laws during the week
10 and come back on the weekends.

11 Q Is that what you intend to continue to
12 do for the foreseeable future.

13 A That's what I have to do. It's not a
14 choice.

15 Q Are there any debts of Idaho Trademark
16 Properties that you're paying off?

17 A Of Idaho Trademark, no -- well, because
18 we haven't received the money we put in there to pay
19 off the bills; yes, there are debts that I've
20 incurred, personally, because of that.

21 Q So you've lost money on this thing too.

22 A Yes.

23 Q How much do you think that you've lost?

24 A Well, any money that was in Jenks
25 Brothers because I paid all the subs to cover that

1 personally. I put the money in there to pay them
2 off because all the accounts were in our name. The
3 subcontractors.

4 So I probably lost fifty thousand
5 dollars.

6 Q Is there a reason why you did not pay
7 on the Magleby's?

8 A It was a management fee. You know,
9 kind of what we had discussed. It was not -- they
10 were finalized as far as Trademark. So I was -- you
11 know, I was not paying everybody else. At that
12 point there was discourse. I was not going to pay
13 for everybody else's percentage.

14 Q Were there disputes as to any of these
15 others that you're talking about that you paid as to
16 what they were to receive?

17 A No. Jenks Brothers paid the invoice
18 amount on there.

19 Q You paid those from your private funds?

20 A It all went through Jenks Brothers.

21 Q How long did Jenks Brothers operate?

22 A Started in 2001 or '02, I believe.

23 We switched from an LLC to a
24 corporation. I can't recall what date it was, but
25 several years.

1 Q Is there any one else that was ever
2 involved in Jenks Brothers besides you and Brandon?

3 A No.

4 Q Your sister was never, or her husband
5 ever apart of this? They were just straight
6 employees.

7 A Employees?

8 Q An employee.

9 MR. GAUCHAY: Nothing further.

10 MR. GARNER: I think you asked all my
11 questions, but I got a few.

12 THE WITNESS: Okay.

13 MR. GARNER: So, I will be quick.

14 EXAMINATION

15 BY MR. GARNER:

16 Q Do you know if the Magleby's were ever
17 included in discussions with any of the partners of
18 Trademark Properties when you met to discuss the
19 payment for their services?

20 A There was individual discussions; never
21 in one meeting with every body.

22 Q Was there a member of Idaho Trademark
23 Properties who took the point in discussing
24 compensation to the Magleby's.

25 A I would say Brady was as much of those

1 conversations when it got down to the end there.

2 Q And why Brady?

3 A He became the one that signed the
4 checks from Trademark over to Jenks Brothers and the
5 head-point man as we formed the company as well.

6 Q Do you know if Brady ever represented
7 to the Magleby's that Trademark Properties pay a one
8 point five percent commission to them from the sale
9 of the house?

10 A I believe Brady thought there was going
11 to be some compensation. I don't believe he agreed
12 to the one point five.

13 Q You heard the testimony of Brandon
14 Jenks with respect to the assets of Jenks Brothers,
15 Inc. --

16 A Yes.

17 Q -- and Trademark Properties, LLC.
18 Would you agree with his testimony?

19 A Yes.

20 Q If you don't know this question, just
21 tell me you don't know.

22 But if there was all this confusion
23 about the management fee that would be paid to the
24 Magleby's, do you know why the Magleby's continued
25 working on the project?

1 A They were individual subcontractors, so
2 they were getting paid for the subcontract work they
3 were doing.

4 Q So as they were working on the project
5 they were being paid for the work they were doing.
6 When would you normally pay someone a management
7 fee?

8 A When it was done.

9 Q So when was the project finished?

10 A At closing. Whenever that closing date
11 was.

12 Q In November approximately of 2007?

13 A Yes.

14 Q So is that the last -- in November was
15 there work done by the Magleby's after closing?

16 A I believe there was. I can't tell you
17 exactly what there was. But I know they were
18 working with the Garn's in finalizing things.

19 Q So if they were doing work after
20 closing, were they doing that work at the request of
21 Jenks Brothers, Trademark properties or the Garn's?

22 A I would say all of the above.

23 Q Do you know what work was being
24 performed after closing?

25 A Minor details, to my recollection, that

1 were -- you know, may be items that the Garn's had
2 noticed as they were approving the purchase.

3 Q Did the Magleby's ever express concern
4 about this discord and confusion about their
5 management fee?

6 A Yes.

7 Q Did they express that concern to you?

8 A Yes.

9 Q What was your response?

10 A I would go to the partnership and see
11 what I could do to try to help them out.

12 Q Did you ever return your report, your
13 conversations, of the partners with the Magleby's?

14 A Return a report to them?

15 Q After you went and talked to the
16 partners, Mike, Chris or Brady, and discuss with
17 them the payment of this management fee; would you
18 return and report those conversations to Chris or
19 Jill.

20 A I believe we had discussed that, that
21 they were not in agreement with it.

22 Q What was the response from Selective
23 Builders?

24 A They were not happy about it. You
25 know, I told them I would do what I could to work

1 through it and help them out.

2 Q You testified earlier that you came up
3 with the ten to \$15,000 amount to be paid to the
4 Magleby's. You kind of pulled it out of the air?

5 A Yes.

6 Q Would you say that is the value of the
7 management for the scope of work they performed on
8 this project.

9 A Yes.

10 Q How many months were they working on
11 this project?

12 A I don't know exactly when the start
13 date was. But I would say five to six months up to
14 closing. And then I believe there was some odds and
15 ends after closing.

16 Q Have you ever seen an invoice for the
17 management fee.

18 A I believe they did submit something. I
19 don't know if it was an invoice or a Contract of
20 Agreement or what it was, but there was something
21 submitted.

22 Q Do you still have that?

23 A I don't have it. I don't know where it
24 would be if I did. I believe Idaho Trademark --
25 Brady might have something like that.

1 Q Why would Trademark Properties have
2 that?

3 A They would be partly responsible for
4 that. They would be responsible for that in the end
5 because it was a partnership. The overall
6 construction of the house.

7 Q Okay.

8 MR. GARNER: That's all the questions I
9 have for Tony.

10 FURTHER EXAMINATION

11 BY MR. JOHNSON:

12 Q I thought this would be a question
13 that -- or an area that Mr. Gauchay would go into.
14 Would you agree that usually at the time of closing
15 a release of a claim of liens would generally be
16 entered by a general contractor as well as subs.

17 A Yes. It's required, yes.

18 Q Okay. And are you aware at the time of
19 closing whether the Magleby's signed a release of
20 any claim of lien?

21 A I am not aware, no.

22 Q What was your involvement with the
23 closing process?

24 A I was not involved much at all. I
25 showed up to sign the documents at the end. And the

1 title company prepared all that.

2 Q Was there any discussions with Idaho
3 Trademark Property as to obtaining any release of
4 liens in conjunction with the closing.

5 A Nope. To my knowledge there was no
6 liens on the property at the time of closing.

7 Q Were you aware of -- I mean, you're
8 aware the Magleby's had performed services?

9 A Yes.

10 Q Do you have any reason to believe that
11 they were not entitled to a lien against the
12 property for their services.

13 A I don't know.

14 Q That is a fine answer if that's the way
15 it is.

16 Now, do you know whether the closing
17 date had been postponed at any time?

18 A I don't recall exactly. There was some
19 changes trying to get it done, or closing it, just
20 because of the lending requirements and different
21 things.

22 I can't recall any explicit details of
23 it.

24 Q Okay. Now to your knowledge can a
25 house be closed without it being complete?

1 A What do you mean by "complete"?

2 Q Baseboards can still be off?

3 A Yes.

4 Q Things like that. I mean, it's not a
5 real complete house if you don't have the trim and
6 those type of things?

7 A Functioning sink and bathroom, you can
8 close a house.

9 Q Sure.

10 And I mean you probably need a
11 certificate of occupancy?

12 A Yes, exactly.

13 Q And if you look at Exhibit 1, the last
14 page, it looks like your certificate of occupancy
15 was in November of 2007.

16 Is that correct?

17 A Yes. If that's what that document
18 states.

19 Q But to your recollection, there was
20 still things to be done after the certificate of
21 occupancy was done, is that correct?

22 A It would be things such as touch up
23 paint. Things that may not have been totally
24 complete, but the owner wanted to close for their
25 lending purposes; but they approved the close of the

1 home.

2 Q Okay. If there was any change of the
3 closing date would you know why?

4 A Brady would have been the person. I
5 had moved on to other projects and doing other
6 things at that time. Brady was the contact person
7 at that time.

8 Q Were you involved in signing any of the
9 documents for closing?

10 A Yes. I signed a closing statement.

11 Q And where would that closing statement
12 be?

13 A First American Title. Rexburg.

14 Q Do you have a copy of that?

15 A I never brought home a copy from that,
16 no.

17 Q Do you know if anyone informed the
18 Garn's that the Magleby's had not been paid for the
19 management portion.

20 A I don't know for a fact. I was under
21 the impression that the Magleby's and the Garn's had
22 talked about and discussed, maybe that between them.

23 Q Okay.

24 Now in conjunction -- I think actually
25 Brandon testified to this. He indicated that he

1 thought \$3,000 was what you would pay to an employee
2 for a management fee.

3 Do you remember that testimony.

4 A Yes.

5 Q Would you agree or disagree with that?

6 A That is what you would pay an employee,
7 whether they are focused on one certain home for
8 that entire time; that should be more than one house
9 as far as they are just the manager, not performing
10 labor there.

11 Q So for whatever services, you're saying
12 that is a full-time employee.

13 A Yes. That would be a full-time
14 employee, but may be has three or four homes going
15 on at the same time.

16 Q So this ten to 15,000 -- I am going to
17 make another stab at it -- you know, is that based
18 on a monthly basis such as this \$3,000, or is it
19 hours or what?

20 A My basis, they were acting as a
21 subcontractor, so they were going to be up there on
22 the project during that same time.

23 To manage the other subs, you know,
24 you're essentially working right beside them to tell
25 them when they come in -- I mean it's not an

1 undue -- a lot of hardship to do it while you're
2 there.

3 Q Is there something that you could say:
4 This relates to what you've paid other people in
5 similar positions for?

6 A They are the only ones I've ever did
7 that with. And they made more than I ever did
8 managing a job.

9 Q Okay. Now you also testified that you
10 thought there could be better communications between
11 the Magleby's and Idaho Trademark Properties.

12 What do you think the Magleby's could
13 have done better as far as their communications with
14 Idaho Trademark Properties?

15 A Demanded a meeting. Not talk to
16 individual partners. But talk to one partner is one
17 thing here. Talk to another partner -- it helped
18 create may be distrust or whatever between the
19 partnerships.

20 So get us all in a room and talk to us
21 all at once so we could agree on something.

22 Q The Magleby's were not any members of
23 --

24 A No. But as far as their agreement to
25 try to set up a meeting between all of us. But we

1 had partnerships. They would drive up. They would
2 check on the project. One thing would be told to
3 one partner, and we did not always get the same
4 story.

5 Q Okay. Did you believe it was the
6 Magleby's responsibility to organize your
7 partnership meetings?

8 A No.

9 Q Then explain that to me as to why you
10 think they needed to demand this meeting for all of
11 you.

12 A Not so much the meeting. But if we
13 tell one partner one thing, the other partner hears
14 the same exact thing.

15 Q Okay. So, are you saying that the
16 Magleby's were saying different things to different
17 people?

18 A In their conversations from what -- I
19 can't testify to that because I was not there. In
20 the other conversations, it's all hearsay.

21 Q Okay. But you can -- don't worry about
22 hearsay because that is for us lawyers to work out.
23 As far as Brady Gardner: Would he tell you that
24 they had a different arrangement or stated a
25 different arrangement with him other than the one

1 and a half percent?

2 A Brady would not tell you what the
3 financial arrangement was. I know they had
4 discussions as well.

5 (technical difficulties)

6 MR. JOHNSON: Go ahead.

7 MR. GAUCHAY: You better rephrase --
8 redo the question.

9 BY MR. JOHNSON:

10 Q Sure. Well, I am just trying to
11 clarify. Is it your belief that the Magleby's were
12 saying different things to different people?

13 A Yes.

14 Q Okay. Who did -- what do you believe
15 they were saying and to whom?

16 A What do I believe?

17 Q Yes.

18 A It would create -- for instance, Chris
19 Ferguson would show up on the job. He would hear a
20 different story than what I am trying to tell
21 everybody what really is and is not.

22 Q So --

23 A He would show up frustrated. You know,
24 he hears about the agreement or -- there was no
25 agreement. You know, may be he does not want to pay

1 it, or whatnot.

2 It was just a mess.

3 Q So what was your understanding as to
4 what the Magleby's were telling Chris Ferguson?

5 A You are talking about 20 different
6 conversations within six months, so I can't tell you
7 exactly what he was telling individuals. All I knew
8 it was creating a confrontation between me and Chris
9 to have a conversation to deal with some of these
10 things instead of coming directly to me.

11 Q Okay. First of all, which Chris are
12 you talking about?

13 A Chris Magleby.

14 Q Now, it's my understanding in your
15 conversations, the only thing as far as the method
16 of compensation between you and Chris, or either of
17 the Magleby's, is one and a half percent. Correct?

18 A We had started there. In talking about
19 it, there was never that is exactly what the fee is
20 going to be. Is that on the sales price? Is that
21 on what you're doing -- the management and the cost
22 of what you're doing?

23 None of that was ever, like I say,
24 written in a contract: This is what the fee is.

25 Q Well, I am not talking about written.

1 I am just talking about the conversation. Did you
2 ever talk with the Magleby's about compensation
3 before they started the work, particularly; that
4 they would be compensated on any other basis besides
5 a percentage basis?

6 A Nothing other than the fact that I
7 would do what I could to take care of them.

8 Q I understand you're being an advocate
9 for them?

10 A Yes.

11 Q Was there a discrepancy between
12 different fractions of Idaho Trademark Property as
13 to who would be responsible for the Magleby's?

14 A Yes.

15 Q What were those fractions or divisions?

16 A Namely Mike Ferguson.

17 Q Mike Ferguson. Who would he say would
18 be responsible?

19 A He would always say: It's not my
20 problem. You know, he would not state who is going
21 to pay for it or anything else. He decided it was
22 never going to be his problem.

23 Q So in other words, he wanted Jenks
24 Brothers to pay for it it sounds like?

25 A Yes.

1 Q And your position was, I assume
2 everybody pays for it?

3 A Yes. Take care of your percentage. I
4 was not getting paid either for the stuff that I had
5 paid for.

6 Q Besides demanding a meeting, what do
7 you believe that the Magleby's could have done to
8 have better communication?

9 A When they saw problems that they would
10 have come directly to me. Talk to me directly.

11 Q To you?

12 A Yes.

13 Q Instead of what.

14 A Instead of hearing the rumblings
15 through the other partners and then created conflict
16 within our partnership.

17 Q What you've talked about, it sounded
18 like one of the problems of Idaho Trademark
19 Properties is that you had too many chiefs and
20 everybody doing the stuff?

21 A It was never defined, responsibilities?

22 Q Were the Magleby's responsible in any
23 way for that division of, or diffusion of control
24 and management?

25 Do you want me to rephrase the

1 question?

2 A Sure.

3 Q I mean, it sounds like everybody felt
4 like they had control. Whereas from what I
5 understand from you and Brandon, it would be good
6 for there be a centralized management of the
7 construction.

8 Is that correct?

9 A Yes. I was -- I had control, and then
10 the partnership and everything decided that they
11 needed to, I don't know, be more apart of it, or
12 whatever they decided. But it made it difficult to
13 move forward.

14 Q "They" would be the other members of
15 Idaho Trademark Property?

16 A Yes.

17 Q If I understand correctly the reason
18 for bringing in the Magleby's was because you had
19 other projects that required your attention.

20 A With the partnership.

21 Q With the partnership. Is that Teton
22 Springs?

23 A (nods yes).

24 Q That is yes?

25 A Yes.

1 Q Were there other subs that were not
2 paid besides the Magleby's at the time of closing?

3 A Not to my knowledge.

4 Q Okay. Now at the time of initially
5 visiting with the Magleby's about their services,
6 were they to be paid from the -- at the sales price
7 of the spec house?

8 A Say that again.

9 Q Okay. Well, when you first started
10 visiting with the Magleby's in the summer of 2007,
11 did you visit or discuss with them what the sales
12 price of the house was going to be.

13 A You know, I don't recall exactly when
14 that conversation took place or when -- if we had
15 talked to them before or after that sale even took
16 place.

17 Q Okay. Did you ever make a statement or
18 hear of any statements being made to the Magleby's
19 that the price of the spec house would be one point
20 six to one point eight million.

21 A No. I don't believe that was the price
22 of the house.

23 Q Did you ever make any representations
24 for any value?

25 A I am sure we talked about what the

1 overall sales price was going to be.

2 Q And what was that?

3 A I believe -- I am not sure what the
4 final number was -- around one five five, or
5 something like that.

6 Q Now, Mike Ferguson: What was his role
7 in this whole thing? It sounds like his role was to
8 be the antagonist?

9 A Live and learn. Mike was a partner in
10 it. And he owns the subdivision in Silverhawk. So
11 he wanted to do some miracle, so he partnered with
12 us to build a house; and was not playing an active
13 role until he had to make a decision. Then he just
14 wanted it his way.

15 Q He is the owner of Bear World as well?

16 A Correct.

17 Q Do you know how frequently he would be
18 on site?

19 A May be three times throughout the whole
20 project.

21 Q When you were there?

22 A Yeah. I mean, I can't say for sure.
23 He's in the area quite a bit.

24 Q Now as far as listing the property, it
25 sounds like he has listed it as a private sale, and

1 not through a multi-listing services?

2 A I don't believe it's on MLS.

3 Q Apparently that's what you would desire
4 it to be?

5 A To make it go away.

6 Q If I understand correctly, he's got
7 other lots besides this lot?

8 A Yes.

9 Q In this lot he has to share the sales
10 proceeds?

11 A Correct.

12 Q Have you brought any action for
13 division or to require the property to be sold
14 through a multi-listing service?

15 A We've all moved away. So just trying
16 to get everybody to get together to make a decision
17 has been the hardest part of it. So we agree to
18 disagree.

19 Q Apparently your position is wait and
20 hope it sells.

21 A We have other things with Mike. And he
22 likes to use that lot as leverage against us on
23 anything else we ever do.

24 Q Do you know of any meetings that were
25 held that involved the members of Idaho Trademark

1 Properties where all of you were together?

2 A There were a few exact dates, and I
3 can't remember when. I know when we formed the
4 company.

5 Q While the Maglebys were involved from
6 July, summer of '07 and thereafter, was there any
7 meetings?

8 A There were, but it was not -- there was
9 other business dealings that were discussed during
10 those meetings. It was not -- this was not the
11 priority of the meetings when we had them.

12 Q Well, I don't know if you had
13 construction meetings or not on a regular basis?

14 A We do now.

15 Q You do what?

16 A Construction meetings now.

17 Q Okay. But on the Silverhawk property,
18 were there any construction meetings?

19 A I would generally meet individual subs
20 and go through things and meet with them. You know
21 with the total ownership, no.

22 Q With the majority, three or four of
23 you, would there be meetings?

24 A Yes.

25 Q Were the Magleby's involved in any of

1 these meetings.

2 A Yeah. They were present with -- you
3 know, two or three of us one time and the other two
4 or three the next time on different occasions.

5 Q Okay. And during any of these
6 meetings, was there any discussion about their
7 compensation and what they would receive?

8 A Yes, I think there was.

9 Q Okay. So when you talk about better
10 communications, one of the things you said is you
11 wanted to have a meeting; that you felt like they
12 needed to demand one.

13 Is there any reason why, during any of
14 those construction meetings, that you could not have
15 addressed those issues?

16 A We should have.

17 Q Whose responsibility do you think it
18 was to bring it up during those meetings?

19 A I think it relied on me and Chris as a
20 whole to -- not so much demand a meeting, but demand
21 an answer.

22 MR. JOHNSON: Nothing further.

23 MR. GAUCHAY: Just a few follow-up
24 questions.

25 FURTHER EXAMINATION

1 BY MR. GAUCHAY:

2 Q Did you have any understanding of
3 whether the Magleby's were licensed contractors?

4 A Yes. I believe they were licensed
5 contractors.

6 Q How does that work? Are they -- do
7 they have to provide you a copy of that license
8 before you can put them to work; or how does that
9 work?

10 A I am trying to think.
11 Some of that regulation has changed in
12 the state of Idaho as far as licensing and all that,
13 so I would have to go back and review dates.

14 Q Did you attend the closing on this
15 transaction?

16 A At the title company, yes.

17 Q Who else from Idaho Trademark
18 Properties was there?

19 A We all signed.

20 Q All five of you?

21 A Yes.

22 Q Were you all there together?

23 A We came separately. But, yes, we met
24 together to sign --

25 Q Okay.

1 A -- briefly.

2 Q Did all of you sign the closing
3 statement.

4 A Yes.

5 Q I am assuming there was some type of
6 preliminary title report that would have been
7 completed.

8 Is that your understanding?

9 A Yes, it had to have been.

10 Q Okay. Was there a third-party
11 financing by the purchaser, the Garn's, do you know
12 whether or not?

13 A I don't know any of those details.

14 Q With regard to the management fee of
15 the Magleby's -- Mr. Magleby, he would have been
16 primarily the one who would have been doing the
17 managing; is that correct?

18 A Yes.

19 Q Okay. And when he was on site, were
20 you still there too?

21 A Occasionally. I mean, I would come up
22 probably once a week may be just to answer
23 questions, or do whatever we could do.

24 Q Okay. Now when you would come would you
25 meet with just him or would you meet with the other

1 subs that were there?

2 A I met with other subs on occasion as
3 well.

4 Q Now, did the Magleby's ever present a
5 written contract or a written demand to you or
6 anyone else with regard to Idaho Trademark
7 Properties as to their compensation for management?

8 A I believe -- I don't have a copy of it.
9 I believe there was an invoice submitted.

10 Q Okay. Was there ever a written
11 contract submitted?

12 A No.

13 Q Did they ever threaten to pull off the
14 project?

15 A I don't believe so.

16 Q They could have done both of those
17 things; it would have brought this thing to a head
18 and got it resolved at that point, is that correct?

19 A I mean, they were performing work that
20 they were getting paid for as well.

21 Q Okay.

22 MR. GAUCHAY: Nothing further.

23 MR. GARNER: I am finished.

24 FURTHER EXAMINATION

25

1 BY MR. JOHNSON:

2 Q Was there any time in which the
3 Magleby's indicated that if they were not paid that
4 they were going to pull off the job site?

5 A During the same period there were other
6 projects they were working on for Brady and
7 different people. I know there was some demands.

8 I could not tell you the time or the
9 date and the exact reasons; if it was that project
10 or a different one.

11 Q At Silverhawk?

12 A Yes.

13 Q But you were aware that there was a
14 frustration?

15 A Yes. They had voiced concern with me,
16 yes.

17 Q Would it be fair to say that they
18 really were not happy not knowing if they were going
19 to get paid or not and how much?

20 A I am sure there they were. Nobody is.

21 Q Okay. Now did you ever leave a camping
22 trip to meet with the Magleby's, or a hunting trip?

23 A I had been hunting in that area that
24 year.

25 Q Let me ask you: Do you recall making a

1 trip up to visit with the Magleby's to smooth things
2 over, to keep things running?

3 A As a contractor that is a pretty common
4 occurrence.

5 Q But specifically in this case with the
6 Magleby's, did you make such a trip, that you can
7 recall?

8 A I definitely came up to meet with them
9 to discuss it, to understand everything that was
10 going on and concerns.

11 I don't recollect what exactly was
12 discussed in that meeting.

13 Q Was there any time that you encouraged
14 them to keep working and that you would make it
15 right with them so to speak.

16 A Yes. I would work on the partnership
17 to try to do what I could.

18 Q Okay. Was there any time that you
19 suggested to the Magleby's that they needed to
20 demand a meeting with all of the partners of Idaho
21 Trademark --

22 A No.

23 MR. JOHNSON: That is all.

24

25 (Deposition concluded at 1:15 p.m.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF BONNEVILLE)

I, Karla Steed, RPR, RMR, CSR, and
Notary Public in and for the State of Idaho, do
hereby certify:

That prior to being examined ANTHONY
JENKS, the witness named in the foregoing
deposition, was by me duly sworn to testify to
the truth, the whole truth, and nothing but the
truth;

That said deposition was taken down by
me in shorthand at the time and place therein
named and thereafter reduced to typewriting under
my direction, and that the foregoing transcript
contains a full, true and vebatim record of said
deposition.

I further certify that I have no
interest in the event of the action.

WITNESS my hand and seal this
_____ day of _____, 2010.

Karla Steed
Idaho CSR No. 755
Notary Public in and for
the State of Idaho

My Commission Expires: 8-21-12

Transcript of the Testimony of **Brandon Jenks**

Date: April 2, 2010

Volume: I

Case: MAGLEBY v. GARN, et al.

Printed On: October 12, 2010

T&T Reporting
Phone: 208.529.5291
Fax: 208.529.5496
Email: tntreport@ida.net
Internet: TandTReport@ida.net

Exhibit 3

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF
FREMONT

CHRIS AND JILL MAGLEBY, dba)
SELECTIVE BUILDERS,)

Plaintiffs,)

v.)

KEVIN AND TANYA GARN, husband) Case No: CV-08-469
and wife, IDAHO TRADEMARK)
PROPERTIES, LLC, JENKS)
BROTHERS, INC., and DOES 1-10)

Defendants.)
_____)

DEPOSITION OF BRANDON JENKS

Friday, April 2, 2010, 9:00 a.m.

Idaho Falls, Idaho

Karla Steed

RPR, RMR, CSR

DEPOSITION OF BRANDON JENKS

BE IT REMEMBERED that the deposition of Brandon Jenks was taken by the attorney for the Plaintiffs, at the offices of Wright, Johnson, Tolson & Wayment, PLLC, located at 477 Shoup Avenue, Suite 109, Idaho Falls, Idaho, before Karla Steed, Court Reporter and Notary Public, in and for the State of Idaho, on Friday, the 2nd day of April, 2010 commencing at the hour of 9:00 a.m., in the above-entitled matter.

A P P E A R A N C E S

For the Plaintiffs:

WRIGHT, JOHNSON, TOLSON & WAYMENT
BY: DAVID A. JOHNSON
477 Shoup Avenue, Suite 109
Post Office Box 52251
Idaho Falls, Idaho 83405-2251
(208) 535-1000
dj@ida.net

For the Defendants, Kevin and Tanya Garn:

SIMPSON & GAUCHAY
BY: KENT W. GAUCHAY
497 N. Capital Avenue, Suite 200
Post Office Box 50484
Idaho Falls, Idaho 83405-0484
(208) 523-2000
kgauchay@sglegal.net

A P P E A R A N C E S (cont'd)

For the Defendants, Idaho Trademark Properties,
LLC, Jenks Brothers, Inc.:
THE LAW OFFICE OF JOSHUA A. GARNER
BY: JOSHUA A. GARNER
24 South 1st West
Rexburg, Idaho 83440
(208) 359-3181

Also Present: Anthony Jenks
Chris Magleby
Jill Magleby

I N D E X
E X A M I N A T I O N

WITNESS

BRANDON JENKS

EXAMINATION BY

PAGE

MR. JOHNSON	5,83
MR. GAUCHAY	58,90
MR. GARNER	78

E X H I B I T S

NUMBER

PAGE

1. Building Permit Application	14
2. Invoice (1044)	31
3. Check (1847)	31
4. Check (2183)	32

1 (The deposition proceeded at 9:00 a.m. as follows:)

2 BRANDON JENKS,

3 produced as a witness at the instance of the
4 Plaintiffs and having been first duly sworn, was
5 examined and testified as follows:

6 MR. JOHNSON: This is the time and the
7 place for the taking of the deposition of Brandon
8 Jenks. I am David Johnson. I represent the
9 plaintiffs in this case, Chris and Jill Magleby
10 doing business as Selective Builders.

11 I would invite counsel to identify
12 themselves and who is with them at this time.

13 MR. GARNER: Josh Garner representing
14 Jenks Brothers.

15 MR. GAUCHAY: Kent Gauchay representing
16 Kevin and Tanya Garn.

17 MR. JOHNSON: Mr. Garner, I believe you
18 also filed an appearance on behalf of Idaho
19 Trademark Properties?

20 MR. GARNER: I have.

21 MR. JOHNSON: All right. Let's get
22 started.

23 EXAMINATION

24 BY MR. JOHNSON:

25 Q Mr. Jenks, have you ever had your

1 deposition taken before?

2 A I have.

3 Q Okay. What circumstances was that?

4 A Development property.

5 Q Okay. Now you probably then understand
6 the ground rules that we try to generally lay out.
7 It's important that you speak audibly and clearly.
8 It's important that you wait for me to complete my
9 question before you answer.

10 That if you don't understand a
11 question, that you ask me to rephrase or to ask the
12 same question again. If you answer a question I
13 will assume that you understand it.

14 If at any time you believe a
15 clarification needs to be made in a previous answer,
16 and particularly if something that you testified to
17 previously is not correct, I would ask you to please
18 bring it to our attention.

19 Understood?

20 A Yep.

21 Q All right.

22 Also -- you just raised another issue.
23 It's important as far as clarity that you avoid such
24 things as body language answers; that is the shake
25 of the head, the nod. Also to make sure your answer

1 is clear, not Uh-huh or Huh-hu or a yep or a nope,
2 or those type of things. Yes or no is always
3 important for a clear record in this case.

4 What is your employment at the present
5 time?

6 A I work for Summit Truss in Royal City,
7 Washington.

8 Q How long have you been so employed?

9 A Since June of last year.

10 Q Of 2009?

11 A Yes.

12 Q And prior to that where were you
13 employed.

14 A Self-employed -- excuse me. I worked
15 for a company in Utah before that.

16 Q What company was that?

17 A Westates.

18 Q West States (sic)?

19 A Yes.

20 Q Is that two words?

21 A One word.

22 Q W.E.S. --

23 A W.E.S.T.A.T.E.S. is how it's spelled.

24 Q And where is that located?

25 A Their office is in South Jordan, Utah.

1 Q What did you do for Summit Truss?

2 A I sell trusses. Run the business.

3 Q What did you do for Westates?

4 A Building project manager.

5 Q And how long were you employed with

6 Westates?

7 A Probably four months.

8 Q Okay. And prior to Westates, were you

9 employed?

10 A Yes.

11 Q In what capacity?

12 A Jenks Brothers.

13 Q Is that a corporation or a doing

14 business as?

15 A That is a corporation.

16 Q And do you know if the corporation had

17 officers?

18 A Yes.

19 Q And who were the officers.

20 A Tony and myself.

21 Q Okay. Tony Jenks?

22 A Tony Jenks and myself, yes.

23 Q And you're brothers?

24 A Yes.

25 Q And what was the purpose of -- or what

1 was the business of Jenks Brothers.

2 A Building contractor. Small
3 developments.

4 Q Did you own any stock or shares in
5 Jenks Brothers?

6 A Yes.

7 Q What was your percent of ownership of
8 that corporation?

9 A Half.

10 Q And who owned the other half?

11 A Tony Jenks.

12 Q And what type of business was it?

13 A Contracting. General contracting.

14 Q All right. Do you know whether or not
15 Jenks Brothers was involved as members of any other
16 LLCs or corporations.

17 A Jenks Brothers -- we were as
18 individuals for sure. Jenks Brothers did work for
19 other corporations.

20 Q What other corporations did Jenks
21 Brothers work for.

22 A Idaho Trademark Properties. Idaho
23 Trademark Partners.

24 Q Tell me about that relationship.

25 A We were a 40 percent owner in the

1 company. Then we contracted with the company to
2 build a couple of homes.

3 Q All right. So as far as your ownership
4 in the company what was the purpose of that
5 involvement?

6 A The purpose?

7 Q Yes.

8 A To buy and sell property.

9 Q All right. Was one of those properties
10 located at 3635 Redtail in Island Park, Idaho?

11 A I don't remember that that is the exact
12 address, but if that's the lot, yes.

13 Q You understand there was a property in
14 Silverhawk subdivision?

15 A Yes.

16 Q And there was a lot. Did you know that
17 it was eventually sold to a Kevin Garn and his wife?

18 A That's correct.

19 Q All right. Let me represent to you
20 that property is located at 3635 Redtail Island
21 Park, Idaho.

22 A Okay.

23 Q How would you describe or generally
24 describe that property. Do you call it the Redtail
25 property? Silverhawk property?

1 A We called it the Silverhawk home.

2 Q Did Idaho Trademark Properties own more
3 than one lot in Silverhawk?

4 A No.

5 Q And tell me about the -- I guess the
6 coming about of that particular property.

7 A The partners in Island Trademark
8 Properties got together, found a way to purchase the
9 property. And with our contracting experience we
10 decided to design and build a home.

11 Q This was going to be a spec house?

12 A Yes.

13 Q All right. So who were the partners as
14 you described them of Idaho Trademark Properties?

15 A Tony Jenks, myself and Mike Ferguson,
16 Chris Ferguson and Brady Gardner.

17 Q Okay. Was Jenks Brothers a member or
18 partner in Idaho Trademark Properties?

19 A No, us as individuals.

20 Q And as far as the share: Was it an
21 equal share then for each person?

22 A Yes.

23 Q I think you testified that you were
24 40 percent owners.

25 A Tony and I, yes.

1 Q And that is what I'm calculating, 20
2 percent --

3 A Got yeah.

4 Q Sometimes even lawyers can do math.
5 All right.

6 So tell me about what your arrangement
7 was as far as duties in Idaho Trademark Properties,
8 particularly as it related to the Silverhawk
9 property.

10 A Our duty was to build the house. I
11 don't know that it got more detailed on our end than
12 that.

13 Q Was that as a general contractor?

14 A Yes.

15 Q What is your understanding of what the
16 duties of a general contractor are?

17 A To oversee the construction of the
18 home.

19 Q What parts of that.

20 A Say the entire home.

21 Q Okay. Did you believe that
22 particularly, as it related to the Silverhawk
23 property, that you were responsible for hiring
24 subcontractors?

25 A Normally, yes.

1 Q The Silverhawk property, was that
2 modified?

3 A Nothing formally.

4 Q Okay. Tell me about it. I mean, was
5 there something that happened where you felt like
6 you lost control?

7 A Within reason a little bit. But a
8 different dynamic; whereas normally it's us as the
9 contractor and not with three other guys owning the
10 home. Also having their say about how you build and
11 what you do on a daily basis.

12 So totally a different dynamic.

13 Q So I think we're kind of having a
14 double parallel conversation here from what I
15 detect.

16 I want to break that down. I want to
17 specifically focus on the Silverhawk property.
18 First of all, were you the persons who obtained the
19 building permit?

20 I am referring to you and Tony.

21 A As in Jenks Brothers?

22 Q Yes.

23 A I don't remember for sure if it was us
24 or if it was in Fremont properties' name.

25 Q Okay.

1 MR. JOHNSON: Let me indicate that I
2 have obtained a copy of the building permit.

3 (Exhibit 1 marked)

4 BY MR. JOHNSON:

5 Q Mr. Jenks, I hand you what has been
6 marked as Plaintiff's Exhibit 1, or Deposition
7 Exhibit 1. Excuse me. Do you recognize that
8 document?

9 A I do.

10 Q Do you recognize this as the building
11 permit for the Silverhawk property?

12 A It does look like the building permit
13 application for the Silverhawk property.

14 Q Than on the first page does that bear
15 your signature?

16 A It does.

17 Q The top part of that, does that bear
18 your handwriting?

19 A It looks to be mine, yes.

20 Q Okay. Do you recall filling out this
21 particular application?

22 A Specifically, no, but I am sure I did.

23 Q So does the date of the application
24 appear to be about when it was done, November 7,
25 2006?

1 A Yes.

2 Q All right. Now what was your
3 involvement in the construction of the Silverhawk
4 property?

5 A My involvement? Can you clarify.

6 Q What did you do.

7 A Overseer. Set it up. You know,
8 organized people to get there and so forth.

9 Q Who were the people that you organized
10 to be there?

11 A Well, Jenks Brothers, we had our own
12 employees that did a lot of the work. The concrete
13 subcontractors, the excavation subcontractors, the
14 framing contractors and so on down the line.

15 Q Okay. Well, let me ask you kind of a
16 question that is a focal point of this case: You
17 understand that Magleby's have filed a lien?

18 A Yes.

19 Q And are seeking to be compensated for
20 work on the Silverhawk property?

21 A Yes.

22 Q What was your involvement with the
23 Magleby's?

24 A It was -- me and Tony were the ones
25 that brought them on to the project to do everything

1 that have been discussed within reason.

2 Q Okay. So when did that take place?

3 A I could not tell you for sure.

4 Q Can you give me an approximation?

5 A If we started in November I would say
6 it was a few months after that.

7 Q All right. Tell me about the process
8 of how they were brought in.

9 A Chris and Jill had done a lot of work
10 for us on townhomes, another project we had. We
11 were pleased with them. We liked working with them.
12 So naturally it transitioned into another project
13 that we, Jenks Brothers, was working on.

14 Q That was the Silverhawk?

15 A Yes.

16 Q Tell us about that transition?

17 A I don't know what to say about the
18 transition.

19 Q Well, did you call them up on the
20 phone? Did you ask them in a personal meeting if
21 they would be involved?

22 A I am sure one way or the other, yes, I
23 did. But I could not tell you specific. But we
24 talked a lot.

25 Q All right. So from what it sounds like

1 you and the Magleby's had an ongoing business
2 relationship?

3 A For sure.

4 Q And that they had done work for you in
5 other units?

6 A Yes.

7 Q And that you desired to use them on the
8 Silverhawk property?

9 A Yes.

10 Q All right.

11 So in conjunction with that, do you
12 recall any conversations that you personally had
13 with the Magleby's related to the Silverhawk
14 property?

15 A Directly, I could not say one specific
16 conversation. But I know that Chris and I had
17 numerous conversations about it. But I could not
18 tell you a specific event when we talked.

19 Q Okay. Why don't you tell us what you
20 do know.

21 A Okay. As we got into this project, we
22 were more or less trying to find a way to get it all
23 done. And so we brought Chris and Jill on to do
24 more or less from the sheetrock on. They were going
25 to finish the home for us.

1 Q How would you describe their role?

2 A Their role was as a subcontractor doing
3 the work. And we discussed them being a manager for
4 us as well.

5 Q So it almost sounds like they were
6 acting as assistant to the general contractor?

7 A That would be reasonably accurate.

8 Q Would they be providing the supervision
9 that normally would be provided by a general
10 contractor?

11 A A portion of it, yes.

12 Q Okay. Now they represent that those
13 type of conversations took place in July of 2007.
14 Would you have any reason to differ from that?

15 A No.

16 Q Okay. Now they've made representations
17 that you agreed to pay them, Chris Magleby, a one
18 percent of the sales price. Do you agree or
19 disagree with that?

20 A We discussed that. The agreement was
21 never formalized because I had to -- I had to make
22 that concession with the other people involved as
23 well.

24 Q Because it was being an Idaho Trademark
25 Property?

1 A Yes. Because I wasn't the sole --
2 normally something like that Tony and I would do
3 something like that. Whatever I did -- whatever we
4 negotiated we live by.

5 But of course this was a different
6 situation because I had to take it back to three
7 other people.

8 Q That would be also Brady Gardner.

9 A Yes.

10 Q Chris and Mike Ferguson?

11 A That's correct.

12 Q Okay. Was that expressed to the
13 Magleby's.

14 A I can't tell you that for sure. I
15 thought it was, but apparently not.

16 Q Okay. I mean, particularly did you
17 ever tell the Magleby's that you had to get approval
18 from the rest of the Trademark Property
19 participants?

20 A I would say given our conversations,
21 yes. If I did not say it, I thought they understood
22 that.

23 Q Okay. And what would you base that
24 understanding on?

25 A His understanding of our partnership

1 and the workings of Idaho Trademark Properties.

2 Q Okay. Did they do work?

3 A Who?

4 Q The Magleby's?

5 A On --

6 Q The Silverhawk property?

7 A Yes.

8 Q Did they do it according to your
9 satisfaction?

10 A Yes.

11 Q What was your understanding as to how
12 they were going to get paid for their services.

13 A The labor, specifically that they
14 performed for the finish trim and painting, they
15 would be paid as any subcontractor; then they were
16 going to get a management fee for performing that
17 service.

18 Q What was the management fee to be based
19 on?

20 A That is where the discrepancy comes in.
21 Because if you talk to the other partners they would
22 say there is no way they would ever pay it on the
23 sales price. They were thinking more construction
24 costs.

25 Q So, they are saying more of just as a

1 subcontractor?

2 A No, because normally there is no
3 management fee with a subcontractor.

4 Q So, it would be based on hourly?

5 A No. It would be based on the amount of
6 dollars of the management that they did.

7 Q Okay. Do you know how many hours of
8 management they did?

9 A I don't, but it was a lot.

10 Q Do you know what basis of compensation:
11 That is, would it be on an hourly basis.

12 A It could be. I've never done it that
13 way.

14 Q How have you done it?

15 A The only time I've ever done this was
16 with Chris on our townhomes that we did --
17 whatever -- a percent, a percent and a half on the
18 cost of our townhomes.

19 Q So, do you recall the name of those
20 townhomes?

21 A I believe that was the Riverwoods.

22 Q Okay. And in that particular situation
23 Chris Magleby would be acting in the same capacity
24 as he did in Silverhawk?

25 A Similarly, just not near as in depth as

1 the Silverhawk home.

2 Q Silverhawk was much more involved?

3 A Well, it's a million and a half dollar
4 home compared to a hundred thousand dollar
5 townhome, yes.

6 Q So bring it into perspective for me.
7 How would that, in your opinion, affect the
8 percentage of management?

9 A Well, the contradiction comes that if
10 you are going to go to the sales price -- I mean,
11 since it's a million and a half dollar home, I don't
12 think I would negotiate the same terms on that
13 rather than a hundred thousand dollar townhome.

14 Q Would it be more or less?

15 A Probably less.

16 Q Okay. Now on the townhouses, was there
17 any interior decorating involved?

18 A No.

19 Q If there was to be compensation on an
20 hourly basis, what would you believe would be a fair
21 rate of compensation for the Silverhawk property
22 management?

23 A Good question. Let's say I had -- if
24 it was one of my supervisors, I would pay them a
25 salary of 3,000 a year.

1 Q 3,000 a year?

2 A 3,000 a month. I would like that.

3 3,000 a month -- that's what we paid our guys -- of
4 course, plus the other stuff, plus the expenses of
5 running it. So that comes to be 20 bucks an hour,
6 something to the sort, may be a little more or may
7 be a little less.

8 Q And if you're acting as the general
9 contractor would you have an hourly rate?

10 A Ask that question one more time.

11 Q If it was you providing the
12 supervision, what would you believe would be a fair
13 rate of compensation?

14 A If it was one of my guys: 18, 20 bucks
15 an hour is what I would have paid to do it.

16 Q What about you personally if you were
17 doing the supervision: What would you expect to get
18 paid?

19 A I get paid a salary for running the
20 whole company. I never broke it out that way.

21 Q Do you know what the market would pay
22 for a manager?

23 A I know what the market pays for a
24 project manager overall: Anywhere today from 30 to
25 80,000 depending on what you're looking at.

1 Q Thirty thousand to 80,000. Is that
2 annually?

3 A Annually, Yes.

4 Q Is that in Idaho?

5 A I suppose.

6 Q Particularly east Idaho?

7 A I think you would be covered in east
8 Idaho there, yes.

9 Q That is quite a range.

10 A I know.

11 Q Who would get the higher amount?

12 A Somebody more qualified that was doing
13 development projects that required a lot of time and
14 energy.

15 Q Now did you have any conversations with
16 the Magleby's about providing interior decorating on
17 the Silverhawk property?

18 A I am sure I had conversations but I can
19 not remember a specific one where it was me and them
20 discussing the interior decorating.

21 Q Are you familiar with a Lorie Fife?

22 A I am.

23 Q Who is Lorie Fife?

24 A Lorie is somebody that my partners
25 brought in to talk about doing some interior stuff

1 on the development we were involved in on a
2 different project.

3 Q Was there any involvement with Lorie
4 Fife --

5 A There was.

6 Q -- on the Silverhawk property?

7 A Yes.

8 Q What was her involvement there?

9 A She was brought in to do something of
10 the sort, interior decorating or some sort of
11 design.

12 Q What happened?

13 A I did not work directly with Lorie, but
14 my understanding is that they were not pleased with
15 the service she provided; so that service was
16 terminated.

17 Q We have been using a lot of pronouns.
18 We have been talking about "partners" and "they".
19 So let's talk about -- first of all, who brought in
20 Lorie Fife.

21 A Brady.

22 Q Gardner?

23 A Yes.

24 Q Do you know under what basis he did?

25 A I could not tell you for sure, no.

1 Q And do you know if he communicated to
2 you under what basis a compensation he brought her
3 in.

4 A I could not. I don't remember. I know
5 there was compensation, but specifically I could not
6 tell you what it is today.

7 Q Okay. Well, my impression from what
8 you're telling me -- I want to see if this is
9 correct. It sounds like there is a lot of chiefs
10 involved?

11 A Way too many chiefs? Good assumption.

12 Q And it sounds like there was not a
13 centralized control on the Silverhawk property.
14 Would that be a fair assessment?

15 A Yes.

16 Q Is that typical on a construction
17 project?

18 A No.

19 Q Would it be fair to say that a general
20 contractor usually runs the show.

21 A On the construction aspect of it, yes.
22 More so than we had control on this one.

23 Q Okay. So, tell me about what was going
24 on in this case as far as who would be hiring who.

25 A Again, it gets back to the definition

1 of roles among partners. Different people wanted
2 different things. Then when you have four different
3 partners having different conversations with the
4 same people it turns into a nightmare.

5 Q Give me examples of that on the
6 Silverhawk project.

7 A Chris and Brady stopped by one day. One
8 of our guys was doing the handrailing. They asked
9 him what the hell is he doing. He said: I'm
10 working. And they said: Why haven't you done
11 anything?

12 Of course, Chris and Jill meet. So
13 then everybody is pissed off at everybody because
14 somebody who supposedly has nothing to do with the
15 project is making their life miserable.

16 One brief example of hundreds.

17 Q Okay. What are some other ones?

18 Well, let me withdraw that question and
19 ask something different. Was there a problem with
20 different people hiring different persons? Would
21 you, as the general contractor, hire the sheetrock
22 and somebody else would hire the plumber?

23 A Not for the major subcontractors. But
24 it was -- may be some of the other -- the other
25 tasks associated with the home like Lorie, yes.

1 Lorie would be the interior design woman that they
2 worked with.

3 Q How did them hiring Lorie sit with you?

4 A I was not excited about it.

5 Q Why is that?

6 A Again, it was -- I could see the
7 writing on the wall. Trying to make a decision and
8 to communicate, it was turning into a nightmare
9 already. It just added one more cog into the chain.

10 Q So, was there any discussions that you
11 had with other members of Idaho Trademark Properties
12 to resolve this, these issues?

13 A There was lots of discussions.

14 Q Was there ever a resolution?

15 A To this day there is not a permanent
16 resolution.

17 Q Okay. Was there any discussions
18 specifically about how to deal with the Magleby's?

19 A I am sure there was lots of specific
20 discussions.

21 Q Okay. And I would like to jump to that
22 particular point and have you describe for me the
23 conversations inside of Idaho Trademark Properties
24 related to the Magleby's.

25 A Okay. I know that -- one way or the

1 other it was brought up that they wanted the
2 management fee on the sales price. We had a long,
3 painful discussion with all five members; of which a
4 couple of them were very adamant there is no way in
5 Hell we should pay them that much money.

6 Q And who were the no-way-in-Hell people?

7 A That would be -- Mike Ferguson was the
8 worst of the worst.

9 Q Okay. What was Chris's position?

10 A Did not like it, but he had no
11 experience to fall on to say otherwise.

12 Q Brady Gardner?

13 A I would say some where in the middle.

14 Q Neutral?

15 A May be. I don't have a specific memory
16 to go with it.

17 Q Okay. And your position?

18 A They were an important part of the
19 system. I did not want to pay them that much, but I
20 knew they needed -- they needed to be paid a
21 substantial amount of money.

22 Q What was the amount of money that you
23 thought would be due and owing?

24 A I think me and Tony discussed this a
25 lot of different ways. Today -- I don't know what I

1 thought then. But today I would say in the fifteen
2 or 16,000 range.

3 Q And do you believe --

4 A That is what I thought I could get my
5 partners to understand and deal with me.

6 Q But they would not even accept that?

7 A I would never say with that dynamic
8 that they would.

9 Q Was that fifteen to \$16,000 figure what
10 you were throwing out to the other members?

11 A I know we discussed that. Throwing
12 out -- I am sure we had numerous discussions about
13 it, and I don't know if it was that specific amount
14 because it went all over the ladder.

15 Q All right.

16 Now, do you recall making payments to
17 the Magleby's as the case went on -- excuse me -- in
18 the latter part of 2007.

19 A If it's the time -- yes, because if it
20 was July when we started, they were doing lots of
21 work; so I am sure we made a number of payments to
22 them.

23 Q Did you have a bookkeeper?

24 A Yes.

25 Q Who is your bookkeeper?

1 A It was Ashley Mollotte.

2 Q I believe she is a relative?

3 A She is my younger sister.

4 Q Okay. Did you receive invoices from
5 the Magleby's.

6 A Yes.

7 Q Let's start with that.

8 Did you -- as part of your duties with
9 Jenks Brothers, did you review invoices?

10 A Normally, yes.

11 MR. JOHNSON: Let's take a break.

12 (off record)

13 (Exhibits 2 & 3 marked)

14 BY MR. JOHNSON:

15 Q All right. I am going to hand you what
16 has been marked as Deposition Exhibit 2. Do you
17 recognize that document?

18 A Yes. I looked at a lot of invoices
19 from Selective.

20 Q Does that appear to be an accurate
21 invoice from Selective Builders?

22 A It appears to be. I know they
23 performed all this work for us, so I would say yes.

24 Q Okay. And if you would look at Exhibit
25 3.

1 A (witness complies).

2 Q Do you recognize that?

3 A Yes.

4 Q What do you recognize that as being?

5 A Looks like a Jenks Brothers check made
6 out to Selective Builders.

7 Q Does that bear your signature?

8 A Yes.

9 Q And does it appear to be reflective of
10 the invoice?

11 A Not the paid in full amount, no.

12 Q Okay. Excuse me. I think actually
13 that is an earlier check than even the invoice.

14 A Okay. I don't have an invoice number
15 to refer to it. So it's a check from Jenks Brothers
16 to Selective Builders.

17 Q Okay. What was the check number on
18 that?

19 A 1847.

20 Q Okay.

21 (Exhibit 4 marked)

22 BY MR. JOHNSON:

23 Q Would you please look at number four.

24 A (witness complies).

25 Q Tell me whether or not you recognize

1 that document.

2 A Yes. Another check from Jenks Brothers
3 to Selective Builders.

4 Q What check number is that?

5 A 2183.

6 Q Do you recall signing that particular
7 check.

8 A I don't recall, but I am sure I did.

9 Q So did both you and Tony sign checks?

10 A We both are authorized signers. I did
11 most of the signing.

12 Q Okay. Now, I notice on the top part of
13 that there is another check -- actually on the
14 bottom -- from Wells Fargo bank and Selective --
15 excuse me -- from Idaho Trademark Properties for
16 \$1,500.

17 A Yes.

18 Q Now obviously there are a couple
19 different dimensions to that. First of all, I
20 assume that is not your signature. It looks like I
21 assume Brady Gardner?

22 A Yes.

23 Q I get a B and G out of it.

24 A I get a B and a G as well. But having
25 not seen his signature, I assume that is Brady.

1 Q So when I see these couple of checks I
2 am curious about who is paying for what as far as
3 the Silverhawk property.

4 A Is that a question?

5 Q Yes. Can you give me any clarification
6 on that?

7 A I can not give you any clarification on
8 what that is for sure, no. I have no idea.

9 Q In conjunction with the Silverhawk
10 property was there a centralized method of paying
11 for the expenses particularly related to
12 construction?

13 A I would say normally we would submit
14 draws and invoices through Jenks Brothers. That
15 would be the norm. But there was definitely, of
16 course, other situations that were not the same.

17 Q And how was Jenks Brothers funding the
18 payment of these expenditures related to
19 construction?

20 A We would, of course, submit draws to
21 the bank for the -- for just construction draws on
22 the loan.

23 Q Okay. Well, that is -- I guess I am
24 trying to get back to: Was there a construction
25 loan?

1 A There was.

2 Q Whose name -- or who took out the
3 construction loan?

4 A Idaho Trademark Properties.

5 Q And do you know who signed on behalf of
6 Idaho Trademark Properties for that?

7 A I do. All five of us.

8 Q Okay. So all five of you were
9 personally liable for that?

10 A Yes.

11 Q And do you know whether or not money
12 was paid from the construction loan to other persons
13 besides Jenks Brothers?

14 A I am sure it was. Well, I think it
15 was. I am sure there is some that were paid direct
16 because they had access to it.

17 Idaho Trademark, of course, took the
18 draw with the Jenks Brothers' information;
19 depositing it into the Idaho Trademark accounts.
20 And then it would be divvied out from there. So,
21 yes, I would say there was for sure.

22 Q And how would decisions be made on what
23 draws to be made or what obligations would be paid
24 out of the construction loan?

25 A The normal process of events was when

1 the work was completed we would submit.

2 Q Would you, as partners or members, meet
3 and discuss those?

4 A Some. Not as much as we should have.

5 Q Okay. Did all five of you have
6 authority to make draws?

7 A I don't know. I would assume so, but I
8 don't know that.

9 Q For one thing it appears that there is
10 different accounts. There is an account for the
11 Jenks Brother. And obviously there appears to be
12 one from Wells Fargo.

13 A Different companies naturally have
14 different accounts, so yes.

15 Q Were you a signa-tore on that Wells
16 Fargo account for Idaho Trademark Properties?

17 A I don't remember for sure. I would
18 guess so, but I don't know that for sure.

19 Q After July of 2007 what role did you or
20 Jenks Brothers play in the construction of the
21 Silverhawk house?

22 A What role? We were still involved, but
23 not as detailed with Chris being there.

24 Q Okay. What were you doing at that
25 particular time after July of 2007?

1 A Working on this and other projects that
2 we had going on.

3 Q How frequently would you go to the
4 Silverhawk property.

5 A I was not the normal construction guy.
6 I probably went once a month. Tony would be the one
7 that -- his responsibility, within Jenks Brothers
8 organization -- who did the actual construction
9 supervision.

10 Q At that particular point, if I am not
11 mistaken, drywall had been basically completed or
12 close to being completed?

13 A I could not say. I would assume
14 something close to that. Yes, if it was July.

15 Q So from that particular point, is it
16 generally referred to as the finish work?

17 A Yes. That's what we call it, yes.

18 Q And so that would be involved in the
19 painting?

20 A Yes.

21 Q The trim?

22 A Yes.

23 Q The putting in granite?

24 A Yes.

25 Q Cabinetry?

1 A Yes.

2 Q As well as floor coverings and so
3 forth?

4 A Yes.

5 Q Do you know who was responsible for
6 hiring -- or obtaining the materials and installing
7 those materials?

8 A Through our subs, Chris and Jill took
9 care of that.

10 Q Okay. And to your knowledge they are
11 the ones who are involved in hiring the
12 subcontractors to complete those particular tasks?

13 A Yes. We discussed -- yes.

14 Q Did you have any involvement in hiring
15 of the subcontractors either for the construction or
16 installation of the cabinets?

17 A Directly? Did I know the guy through
18 Chris, yes.

19 Q Okay.

20 A But directly, no.

21 Q Okay. The direct contact was the
22 Magleby's?

23 A Yes.

24 Q The hardwood floors: Magleby's?

25 A Yes.

1 Q Crown molding?

2 A Yes.

3 Q Marble and granite.

4 A Yes.

5 Q All Magleby's.

6 A Yes.

7 Q Carpeting?

8 A Yes.

9 Q Some stucco work?

10 A I am trying to remember.

11 Q Or siding?

12 A Siding, yes. I can't remember if there
13 was stucco on the house. There is some. Yes.

14 Q Doors?

15 A Yes.

16 Q Hardware?

17 A Yes.

18 Q Now in conjunction with this

19 construction -- let me indicate that I have seen a
20 sales agreement with the Garn's that took place, I
21 believe, sometime in the summer of '07.

22 A Okay.

23 Q Is that basically your understanding?

24 A Yes.

25 Q What was your involvement in the

1 process of the sale of that property?

2 A My involvement? I met with the Garn's
3 representative one time. Other than that, the proposals
4 would be brought. As a company we had a say in:
5 Yes or no, we like that. No, we don't.

6 Q I guess the question is: Who is the
7 point man?

8 A Brady was the point man for the sales.
9 Like I say, I was not directly involved.

10 Q Did you have any understanding that
11 this house would be completed according to the --
12 not necessarily specifications -- but the design of
13 the Garn's.

14 A The design of the Garn's?

15 Q Yes.

16 I mean, for example, did you have any
17 knowledge that they would be allowed to pick the
18 paint colors?

19 A Specifically, I can't remember exactly
20 what they picked out. I know it was written into
21 the contract. So, yes, there were some modifications
22 made by the Garn's.

23 Q Well, may be the more direct question
24 is: The Garn's would be involved in the finished
25 product?

1 A Yes.

2 Q Did you know that Jill Magleby was
3 working on this particular project?

4 A Yes.

5 Q And how did you know that?

6 A Conversations with Chris and Jill --

7 Q Okay.

8 A -- and Brady.

9 Q And do you know that Jill was working
10 with the Garn's?

11 A Yes.

12 Q And what is your basis of knowledge?

13 A Secondhand information I suppose.

14 Q From who?

15 A Brady, I guess.

16 Q Okay. Well, did you understand at the
17 time that was going on that Jill was involved in
18 doing the interior decorating on the Silverhawk
19 property.

20 A Yes. I was made aware that that was
21 happening.

22 Q That is by Brady Gardner?

23 A I think.

24 Q Is there any other possible sources
25 of that information?

1 A It could have been Chris. It could
2 have been Brady. But I am sure it started with
3 Brady one way or the other.

4 Q Did you have any involvement with the
5 Garn's?

6 A Directly? I never spoke to the Garn's
7 until after the house was complete. I don't think I
8 did.

9 Q Now going back to the Riverwood
10 project: You indicated that -- I want to make sure
11 it's understood -- that you're compensating Chris on
12 a one and a half percent of the sales price basis?

13 A That sounds about what we did, yes.

14 Q Okay. In conjunction with the sale of
15 that Silverhawk property, do you know how you
16 received compensation?

17 A How I received compensation?

18 Q I am talking about Idaho Trademark
19 Properties as a whole.

20 A Are you asking after the closing of the
21 property, the compensation?

22 Q Yes.

23 A When we closed the house, we paid
24 off -- of course, the construction had to be paid
25 off. Then we traded the lot that was next to this

1 one.

2 Q What do you mean by that?

3 A They owned another lot in Silverhawk.
4 And as we closed one -- the compensation we got was
5 another lot.

6 Q Okay. And what is the status of that
7 lot?

8 A It's still sitting there.

9 Q Do you know whether or not Idaho
10 Trademark Properties owns other lots in that area?

11 A I know Idaho Trademark Properties owns
12 no other lots in that area besides that one.

13 Q Now is Idaho Trademark Property
14 involved in selling like through a broker lots.

15 A Not that I am aware of.

16 Q Okay. Well, let me tell you -- it has
17 nothing to do with the deposition. I have another
18 case that involves Silverhawk. It seems like I saw
19 several signs up in that area that said Idaho
20 Trademark Properties.

21 A That is the only other one -- there
22 should be a sign there. I am not saying there is
23 not, but you never know.

24 Q But you're understanding of that
25 particular lot: It's for sale?

1 A Yes.

2 Q And have you received any money out of
3 the proceeds of the Silverhawk, I will say, the 3635
4 Redtail just to make sure we're there?

5 A As far as we have received proceeds to
6 build the home. But they actually still owe Jenks
7 Brothers \$60,000.

8 Q Who is "they"?

9 A Idaho Trademark Properties.

10 Q And if I guess -- take a logical
11 reasoning you got to wait for the next lot to be
12 sold?

13 A Something of the sort. Well, that was
14 not -- that was not the plan when we did it. But at
15 this point, frankly, we've kissed the \$60,000
16 good-bye because I don't think we're going to get
17 it.

18 Q Why is that?

19 A Because of the fiasco of Idaho
20 Trademark Properties.

21 Q Tell me about the fiasco.

22 A How much time you got?

23 Q I got a lot.

24 A I don't, so I will be brief. Through
25 all this, we had multiple, serious disagreements

1 within the company.

2 And at this point dissolution is --
3 that's what -- we all want to be separated. That's
4 what it boils down to. So there was nobody on the
5 same page in the end of this, and it was ugly for
6 everybody involved.

7 Q Okay. So tell me about, I suppose, the
8 alliances or conflicts. I assume that you and Tony
9 are still in good terms with each other?

10 A Yes. I would say even today we're back
11 on reasonable terms. But there was -- we were
12 accused of stealing money. There was an audit done
13 on our books to verify.

14 So, it was ugly.

15 Q What is the relationship between you
16 and Tony and the Ferguson's.

17 A As --

18 Q Is there animosity between --

19 A Today, no. Me and Tony were discussing
20 that on the way down today. No, I am passed
21 animosity.

22 Q Is there still conflict?

23 A Not open conflict. But if we had to go
24 back and dredge all this up, there would be.

25 Q Well, has there been any winding up of

1 the affairs of Idaho Trademark Properties? That is
2 kind of a legal term I know.

3 But has there been a resolution as to
4 what is going to be happening so you can end this
5 Idaho Trademark Property?

6 A Specifically, no.

7 Q You're not functioning as developers?

8 A No.

9 Q You're not functioning as builders?

10 A No.

11 Q But you still apparently own a lot?

12 A Yes. We own -- we own a percentage of
13 that lot.

14 Q What is your percentage of ownership?

15 A Same as the other one: 20 percent for
16 each of us.

17 Q So you and Tony together own
18 40 percent?

19 A Yes.

20 Q Is there any loans against that
21 particular lot?

22 A Not that I am aware of.

23 Q So do you know the value of the lot.

24 A Anybody's guess today.

25 Q Okay. Well, I think I saw in the real

1 estate agreement about three-hundred forty,
2 \$350,000?

3 A I would say in that neighborhood, yes,
4 that's what it was.

5 Q I understand that there is a tremendous
6 demand for those?

7 A Yeah, they are flying off the shelf.

8 Q Of course, just for the record -- I got
9 to make sure we clarify: That is sarcastic. Is
10 that correct?

11 A I hoped it was not sarcastic. That
12 would be better for all of us.

13 Q That's correct.

14 Was there any discussion in the
15 meetings of the members of Idaho Trademark Property
16 about paying the Magleby's with the sales proceeds
17 of the other lot in Silverhawk that was received?

18 A There was a discussion about paying
19 Magleby's with proceeds. Whether it was after -- I
20 would say yes there probably was.

21 Q Was there any agreement?

22 A There was never an agreement.

23 Q So is there an agreement among the
24 members of Idaho Trademark Property about how the
25 proceeds of this lot, this second lot -- I think

1 it's called lot 22 --

2 A Okay. That sounds correct.

3 Q -- would be utilized for?

4 A The only standing agreement is
5 percentage-based.

6 Q Are there other obligations of Idaho
7 Trademark Property outstanding?

8 A Other than what we're still owed on the
9 house and the Magleby's, I don't believe there is.

10 Q Okay. I understand Magleby's part.
11 What about you?

12 A Like I said, when we finished the
13 construction it was actually 52,000 that we were
14 short because the construction loan was not enough
15 to cover it.

16 And after that we thought we had an
17 agreement reached with some other business things
18 coming in, so we paid another eight or nine thousand
19 because we thought we were going to get a balance.
20 That is how we were trying to get it separated.

21 It never happened. Hence, we're about
22 60,000 left unpaid on the house today.

23 Q I think I may be understanding the
24 issue. So you understand that Idaho Trademark
25 Property -- according to your position -- owes the

1 Magleby's the money?

2 A Yes, some money for sure. Yes.

3 Q And I understand that there is an issue
4 as to the amount?

5 A Yes.

6 Q And it sounds like you believe that
7 Jenks Brothers is owed some money for the
8 construction aspect as general contractors?

9 A Yes.

10 Q Then after those two obligations are
11 paid, then it's the -- at least a verbal
12 agreement -- that the proceeds would be distributed
13 according to ownership, interest of Idaho Trademark
14 Properties?

15 A Yes.

16 Q Is there anything that would need to be
17 clarified from that statement?

18 A The statement is a hundred percent
19 correct. Whether that happens, there would be a lot
20 of clarification.

21 Q Okay. Now, has there been any
22 reduction of that agreement to writing?

23 A No. That is where -- no, there is
24 nothing in writing about it at this point.

25 Q So it sounds like you have some

1 trepidation about whether it's going to come about?

2 A Well, that's why -- you can understand
3 what I said previously: That we kind of made our
4 bones. We lost a lot of money in this house with
5 everything else we did, and we're trying to survive.

6 Q When things go south, it's awful hard
7 to have a lot of trust.

8 A Talk is cheap.

9 Q When the Magleby's were working on the
10 Silverhawk house, did you meet with them on
11 occasion?

12 A Yes.

13 Q And go over work that you wanted them
14 to do?

15 A Yes, I am sure we did.

16 Q Is there anything that you could
17 articulate where they went beyond what they were
18 supposed to do?

19 A My expectation of Chris and Jill was
20 high because they did a good job, frankly. So I
21 would say above the industry standard: Numerous
22 occasions.

23 They probably did more than a lot of
24 things. That is my personal opinion. That is not a
25 business side of it. But I would say yes.

1 Q I appreciate that.

2 Was there anything they did -- they
3 incurred debt, and that you thought that they should
4 not have incurred? Whether they hired a contractor
5 they should not have hired? Whether they bought
6 materials that was excessive or exorbitantly
7 priced?

8 A I don't have a specific recollection.
9 If I go back and verify some things, I would say
10 probably so. So I would probably ask those
11 questions. But today I don't have any worries like
12 that.

13 Q Okay. Now after the closing with the
14 Garn's, did you have any conversations with the
15 Magleby's about their compensation?

16 A After the closing, which would have
17 been --

18 Q I think about November of 2007.

19 A I am sure there was conversation, yes.

20 Q Have you ever made a statement to the
21 Garn's or to the Magleby's that they are not
22 entitled to compensation?

23 A No.

24 Q To the best of your knowledge would it
25 be Brady Jenks that brought in Jill Magleby to do

1 the work?

2 A You said Brady Jenks?

3 Q Excuse me. Brady Gardner.

4 A I would say that was all of us as a
5 whole. I wouldn't say that was just Brady.

6 Q That would include the Ferguson's?

7 A Yes, at least Chris Ferguson.

8 Q Okay. Sounds like Mike Ferguson was
9 kind of the antagonist of this if I'm getting the
10 drift.

11 A Like I say I'm passed that.

12 Q I'd better not --

13 A Yeah, I've been antagonized a little.
14 Like I said, we could be here for a
15 week if you get into that.

16 MR. JOHNSON: Sure. Lets go off the
17 record.

18 (off record)

19 MR. JOHNSON: All right. Mr. Jenks,
20 just a couple of other questions.

21 BY MR. JOHNSON:

22 Q Obviously one area that we need to make
23 sure we're clear on is the compensation to the
24 Magleby's.

25 At the time that they got involved what

1 was your understanding as to how they were going to
2 be compensated?

3 A What was my understanding? It was
4 going to be a percentage of the project, and that
5 would be it.

6 Q Okay. And apparently they were working
7 on Riverwood at this one and a half percent, is that
8 correct?

9 A Yes.

10 Q Did you specifically talk about the
11 same percentage on the Silverhawk property as the
12 Riverwood property, or whether there would be any
13 deviation from it?

14 A I am sure that when we initially
15 conversed about it, that was the case.

16 Q What was the case?

17 A That we discussed the same percentage,
18 the same structure we had done previously.

19 Q Was there any discussion about more or
20 less involvement of the Silverhawk property versus,
21 I think, you called them townhouses?

22 A Specifically, I don't remember a
23 conversation about that.

24 Q Okay. But your understanding, it would
25 still be the one and a half percent?

1 A We discussed this. But like I say, it
2 was never finalized with the other powers.

3 Q Okay. Did you ever get back to and
4 tell the Jenks -- excuse me -- the Magleby's that
5 that amount was not approved or is going to be on a
6 different basis?

7 A I don't remember a specific
8 conversation. But I know there was a lot of
9 conversation about it. I could not remember if it
10 was specifically with Chris or the four other
11 partners. But there was a lot of conversation
12 because -- anyway, they were not happy about it.

13 Q Yeah. And I assume that you felt not
14 good about having this conflict in this lawsuit.

15 A Not a bit.

16 Q And except for payment, you got along
17 well with the Magleby's?

18 A Yeah. Like I said, I always have been
19 pleased with their work. And I enjoyed working with
20 them.

21 Q If the Magleby's take the position they
22 were never told anything different than the one and
23 a half percent, would you disagree with that?

24 A I could not say for sure.

25 Q Okay. Now the next question is this

1 Lorie Fife. It sounds like the other partners
2 brought her in.

3 A Yes. The other partners were the
4 instigator of that. Was I around and talking to
5 them, yes.

6 Q Were you aware as to how she was going
7 to be paid?

8 A I think I was at the time. But I don't
9 recall specifically anything about it right now.

10 Q Okay. If I was to represent that she
11 was to be paid a dollar a square foot, would you
12 agree or disagree with that or say I have no idea?

13 A I would say that is probably in the
14 ballpark, but I don't know that for sure.

15 Q Okay. Apparently, the dealings with
16 Lorie was somebody other than you?

17 A Yes. On the direct dealings, I was not
18 involved.

19 Q Do you know what the square footage of
20 that house was?

21 A Seems like it was fifty-two or 5,300.

22 Q If we're to say it was 8,200, would you
23 agree or disagree?

24 A At Silverhawk?

25 Q Yes.

1 A I would disagree.

2 Q You think it was 5,200 square feet.

3 A That is what I had in my head.

4 Q Do you have a copy of the prints?

5 A They are probably in existence some
6 where.

7 Q I guess, the question is: If I wanted
8 to find out what the square foot of that property
9 was --

10 A It should be in the building permit
11 some where.

12 Q Where would it be? Would you look at
13 Exhibit 1 and tell me. You only have a partial one.

14 A In here, in Exhibit 1, under Build Jobs
15 and Inspections it has living space of 3,988.

16 Then it has basement finished of 1,728.

17 Q Okay.

18 A And that is garage or shop on top of
19 that. So that is where the living space is probably
20 the discrepancy.

21 Q Now when you hired -- the Magleby's,
22 were they hired for the project or the whole, or
23 were they limited to the interior when you initially
24 dealt with them?

25 A Initially, our previous business

1 dealings would have been interior only.

2 Q Okay. Are you of the understanding
3 that they took on some responsibilities on the
4 exterior part?

5 A Yes.

6 Q What parts are you aware they took on?

7 A The siding.

8 Q Anything else?

9 A Not that I can recall offhand.

10 Q Well, as far as clean up of the
11 project?

12 A I would say, yes, they were probably
13 doing that as well.

14 Q Okay. Any -- I don't know if
15 landscaping was --

16 A We did not do much landscaping.

17 Q So, when you talked about this one and
18 a half percent, that was for the interior portion
19 only; is that correct?

20 A Yes. That is the way it was discussed.
21 Yes.

22 Q Okay.

23 MR. JOHNSON: Thank you, Mr. Jenks. I
24 think I will probably volley over to Mr. Gauchay
25 to see if he has any questions.

1 If you want to come over here.

2 EXAMINATION

3 BY MR. GAUCHAY:

4 Q It's Brandon, is that correct?

5 A Yes.

6 Q Brandon, can you tell me the plans for
7 this particular project where the construction
8 plans came from?

9 A Are you asking who designed the plans?

10 Q Yes.

11 A A Plus Drafting would have been the
12 drafting firm, I guess.

13 Q Okay. Is this a particular plan that
14 you had ever constructed before?

15 A No. This specific house, we never
16 constructed before.

17 Q This type of project -- this type of
18 home, was that something that you had been involved
19 in the construction of before?

20 A We've built some nice homes. Nothing
21 waterfront in the mountains.

22 Q Okay. And had you had other projects
23 with Idaho Trademark Properties?

24 A This was our first.

25 Q I assume the last?

1 A Yes, you could say that.

2 Q With regard to Idaho Trademark
3 Properties, what was the procedure for actually
4 making decisions?

5 A The procedure changed as the process
6 went along. So it started -- Tony and I, Brady
7 probably made the majority of the decisions. As the
8 problems crept in, then it was everybody.

9 Q So when the decision was made to
10 replace Lorie Fife, how was that made?

11 A Specifically, I don't remember.

12 Q Did you participate in that decision?

13 A I am sure I was part of the
14 conversation. But as far as making the decision, I
15 don't remember having anything to do with it.

16 Q Were there ever things that were
17 discussed where it was the agreement that we got to
18 be unanimous on this, or how did that -- was it a
19 majority?

20 A There was discussions. But it was so
21 Helter Skelter that there was nothing specific
22 there.

23 Q Is there any writing creating Idaho
24 Trademark Properties?

25 A Yes. We do have an operating agreement

1 and so forth about the proper procedure to make
2 decisions. But, you know, when it's not major ones,
3 people have a hard time living by the specifics in
4 the operating agreement.

5 Q Okay. Did anyone ever bring up the
6 fact that you were not following the operating
7 agreement.

8 A I don't recall anything of that, no.

9 Q Do you have a copy in your possession
10 of the operating agreement.

11 A I don't right now. But it's around
12 some where.

13 Q Okay. And do you have a file on this
14 particular project? I mean, how did you keep your
15 records?

16 A Yes, we had a file in our office that
17 has of course since gone. But I am sure it's in a
18 file or a box some where.

19 Q Where would that file or box most
20 likely be?

21 A I don't know. I mean, I've moved. He
22 has moved since. So I don't know for sure.

23 Q Okay.

24 A It's in storage or something some
25 where.

1 Q But would this be a file, a record of
2 Idaho Trademark Properties, or for you and your
3 brother?

4 A Specifically, the Idaho Trademark one?
5 We had an office together. That's gone. I don't
6 know where it would end up for sure.

7 Q Was there a particular individual who
8 kind of took the lead as far as this break-up was
9 concerned?

10 A As far as the break-up, it probably
11 would have been me and Brady on, you know,
12 negotiating our separate sides.

13 Since then, it has changed all over
14 again. Today there is no animosity for me. I mean,
15 we could walk there and have a conversation
16 tomorrow. So it's not a major issue right now, at
17 least, the relationship.

18 Q Okay. Then, do you believe that there
19 is an agreement among the five principles of Idaho
20 Trademark Properties with regard to this particular
21 project and how outstanding liens and obligations
22 are to be satisfied?

23 A There is not a specific agreement, no.

24 Q Nothing has ever been reduced to
25 writing on this?

1 A Not a thing.

2 Q Okay. Is there any writing between
3 Idaho Trademark Properties and the Magleby's?

4 A Probably not.

5 Q Okay. Did you ever have a written
6 agreement with the Magleby's on any of the projects
7 that they worked on?

8 A The only thing we've had is if they
9 would submit us a bid. That is the document -- you
10 know standard practice.

11 When I would say: I would like you to
12 do this. Submit me what it's going to cost. That
13 was the document that we worked from. But any
14 verbiage, there has been nothing written down
15 between us.

16 Q So there is no document that specifies
17 the exact role the Magleby's would have played in
18 this particular project?

19 A No.

20 Q Are there notes -- did you take any
21 notes?

22 A I am sure I noted our conversation.
23 But three years ago, I am sure there's nothing left
24 of that.

25 Q Those records would have been lost?

1 A Yes. At the time, they were not
2 records. It was my chicken scratch.

3 Q Is there anything that you can think of
4 that you can look at that would refresh your memory
5 as to any conversations you may have had with the
6 plaintiffs or with any of the other partners of
7 Idaho Trademark Properties?

8 A I tried to find my planner from that
9 last week, and I did not have any luck. So I don't
10 know that I am going to have anything specific that
11 would remind me. No.

12 Q You indicated earlier that on a project
13 of this size that your thought would be typically to
14 negotiate a smaller percentage for the work that the
15 Magleby's would have done.

16 What do you believe of that percentage
17 would be fair.

18 A I don't have a specific percentage
19 or -- you know, like I said fifteen or 16,000 is
20 something that I thought I could may be work with
21 the partners on.

22 I never even figured the percentage.
23 But it's a big, difficult home. It's the dollar
24 amount that changes especially when there is -- you
25 know, if you're making \$10,000 on a townhome, it's

1 different than if you're making hopefully a couple
2 hundred thousand dollars.

3 Where do you draw the line about what
4 the percentage includes?

5 Q Okay. At the time that the Magleby's
6 were working on this project were they working on
7 any other projects for you?

8 A I would say yes.

9 Q What would those other projects have
10 been?

11 A Townhomes that Jenks Brothers owned in
12 Rexburg. Idaho Trademark had another home in Teton
13 Springs. Then there was another different company
14 involved.

15 I can't remember the specifics of the
16 schedule that goes with it; but they were working on
17 at best two other projects for us at the time.

18 Q And how did you keep that separate as
19 far as payments?

20 A As far as payments? Of course, Jenks
21 Brothers as the contractor would invoice Idaho
22 Trademark Properties specific for the stuff that we
23 did for them.

24 It would be job specific on each home.
25 So that -- of course, that is the plan. Now it's

1 never as clear as that when you get down to billing
2 for three different projects and you have the
3 contractors working on all of them.

4 But the plan was exactly that. We
5 invoiced for a specific job, for a specific company,
6 then we get paid accordingly; then, of course, we
7 divvied out the money.

8 Q If you would take a look at Deposition
9 Exhibit Number 2, please?

10 A Okay.

11 Q That's the invoice from Selective
12 Builders, is that correct?

13 A Yes.

14 Q That is dated October 16, 2007?

15 A Yes.

16 Q And it shows an amount paid of
17 22,853.50.

18 A Okay.

19 Q Do you see that?

20 A Yes.

21 Q Then it shows the amount due as zero.

22 A Okay.

23 Q Now, do you have any records anywhere
24 that would reflect your total payments to Selective
25 Builders for this particular project?

1 A Probably so.

2 Q Where would those records be?

3 A We still have the computer that the
4 Quickbooks file was kept on.

5 Q Then if you look at Deposition Exhibit
6 3.

7 A (witness complies).

8 Q The date on that check is August 7,
9 2007; is that correct?

10 A That's correct.

11 Q Do you believe that you received other
12 invoices from Selective Builders other than Exhibit
13 2?

14 A I am sure I did.

15 Q For this particular project?

16 A Other than Exhibit 2, yes, we had to
17 have. Because -- I mean, I don't know that for
18 sure; but I would say I probably did.

19 Q Did you typically pay from an invoice?

20 A Yes.

21 Q So would it be fair to assume that when
22 you wrote this check 1847, which is Deposition
23 Exhibit 3, on August 7, 2007 that you were probably
24 paying an invoice?

25 A An invoice or a series of invoices,

1 yes.

2 Q Okay. And did you have -- then if
3 you look at Deposition Exhibit Number 4 --

4 A (witness complies).

5 Q -- these checks, both checks, are dated
6 12-11-07?

7 A Yes.

8 Q Do you know what those checks would
9 have been paying for?

10 A Specifically, no.

11 Q Do you know of any invoice that would
12 have -- that you would have been paying with regard
13 to these checks?

14 A I am sure I had invoices from them, at
15 least on the Jenks Brothers' one. The Wells Fargo
16 one, I don't have any recollection of that
17 whatsoever.

18 Q Okay. Help me understand why we got
19 check 1015, which I think we're assuming is signed
20 by Brady Gardner?

21 A Yes.

22 Q And that says that account is at Wells
23 Fargo. It's under the name of Idaho Trademark
24 Properties, LL (sic).

25 And then you were paying off your

1 individual account, is that correct?

2 A Yes.

3 Q So explain to me how that worked. Why
4 if this is an Idaho Trademark Properties' project
5 that you were paying plaintiffs, Magleby's, with
6 Jenks Brothers' checks.

7 A Because being the contractor --
8 initially the subs would submit me the invoice; then
9 I would gather all the information from the
10 subcontractors.

11 Then I would submit a draw to Idaho
12 Trademark Properties. Idaho Trademark Properties
13 would then draw the money from the bank. Write a
14 check to Jenks Brothers. Then we would divvy out
15 the funds.

16 Q And so those records are some where,
17 and --

18 A Yes. At least on the computer.

19 Q -- should reflect those payments --

20 A Should reflect that, yes.

21 Q -- back reimbursing Jenks Brothers for
22 these?

23 A Yes.

24 Q Then if that's the case, do you have
25 any understanding of why Brady Gardner wrote

1 Selective Builders a check for \$1,500 on Idaho
2 Trademark Properties?

3 A Specifically on that one, I don't
4 recall, no.

5 Q Okay. Do you know whether there were
6 any other checks that were written that way?

7 A I don't know for sure, no.

8 Q Who would have kept the account or the
9 records on the account at Idaho Trademark Properties
10 LL? I can't see a C.

11 A Me either. Who knows. Brady would
12 have done that.

13 Q Okay. Who was normally responsible for
14 getting the draws on the construction loan? How did
15 those come back to Jenks Brothers?

16 A Same thing: We would write a check out
17 of the Wells Fargo account to Jenks Brothers with
18 the amounts.

19 Q And who had the authority to sign on
20 the Idaho Trademark Properties, LL account?

21 A I don't know everybody for sure. But I
22 think that we were all authorized to sign.

23 Q Okay. Do you recall any specifics of
24 where you may have reimbursed Jenks Brothers with
25 you signing the check, or do you have any

1 recollection of that.

2 A As far as the draw number, I bet I
3 signed some checks. But, again, that is where you
4 mentioned the accusations came; and that's why we
5 did a specific audit to verify all that.

6 Q Who performed the specific audit?

7 A What's her name? Schwendiman, Sutton
8 and Associates in Rexburg. An accounting firm.

9 Q Did you receive a copy of that? Of the
10 audit?

11 A Yes. I am sure I received a copy of
12 what they came up with in the end.

13 Q Do you still have that.

14 A I am sure it's some where.

15 Q Okay.

16 A Who knows where it ended up.

17 Q Okay. Is Jenks Brothers doing anything
18 now?

19 A Jenks Brothers is done.

20 Q Do you own any properties?

21 A No.

22 Q As individuals -- speak for yourself, I
23 guess. I am not sure if you can speak for your
24 brother.

25 Do you own any property as an

1 individual?

2 A We still have homes, but they are
3 mortgaged to the hilt more or less.

4 Q Who is the principle mortgage owner on
5 those?

6 A My house is Washington Federal.

7 Q This is your personal house?

8 A Yes.

9 Q Is that located in Washington, or do
10 you --

11 A No, I have a house in Rexburg. We're
12 trying to sell it.

13 Q Do you own other properties other than
14 your home?

15 A No -- well, yes. Me personally? The
16 other property we have is the aforementioned lot up
17 there that we still have my name attached to.

18 Q So you say your name attached to. I
19 mean, what do you mean by that?

20 A Idaho Trademark Properties owns it, and
21 I am a member of that still.

22 Q Your name is not individually on it?

23 A No, it's not individually on it.

24 Q Okay. Do you know whether or not
25 anyone has filed any liens or lis pendens against

1 that lot?

2 A I have seen nothing to tell me that.
3 But I don't know for sure. I haven't looked at
4 anything.

5 Q Is that being actively marketed by
6 anybody at this point.

7 A I would say not actively. There may be
8 a sign on the property.

9 Q Who would be the contact person on that
10 sign.

11 A I don't know for sure.

12 Q What is your recollection of when the
13 Garn's first became involved in this project?

14 A Late summer 2007.

15 Q Okay. And you say that you met with
16 their representative.

17 Do you remember who that was?

18 A I can't remember his name right now.

19 Q Was it a realtor?

20 A No, it was a friend of his, a friend of
21 Kevin's, that owned a lot in Silverhawk as well.

22 Q So, as you sit here today, do you have
23 a specific recollection or a clear recollection of
24 exactly what you agreed with the Magleby's as far as
25 what they would perform?

1 A That's where -- there was a specific
2 conversation, but there was never anything finalized
3 and agreed on in my opinion.

4 Q Have you, since the building of this
5 home, used these particular construction plans
6 again?

7 A No.

8 Q Are you aware that there were some
9 problems with the home?

10 A Well aware.

11 Q How did you first become aware of
12 those?

13 A I think Chris called me.

14 Q Did you make any effort to address
15 those concerns?

16 A I spent three days up there the next
17 week.

18 Q What did you do during those three
19 days?

20 A Pulled things apart trying to assess
21 the extent of the damage and what happened.

22 Q What did you discover.

23 A Discovered there was serious water
24 damage from water coming in on one of the walls in
25 the upstairs.

1 Q And what was the -- how did that
2 result?

3 A How did it result?

4 Q How did the water get into the wall?

5 A Do you want my opinion?

6 Q Yes.

7 A Combination of things. When we do
8 roofing like that, we do normally 18-inch flashing.
9 In that area most people will shovel snow on their
10 roofs when you have -- it was a big snow year.

11 So a combination of the water standing
12 against the wall on the second floor because of the
13 snow load.

14 I looked for everything from
15 condensation to -- we spent a lot of time up there
16 trying to figure it out because we take that part
17 of it seriously. So --

18 Q When you say "we", who are you
19 referring to?

20 A Tony and myself.

21 Q Did you take any pictures or document
22 that at all?

23 A I did.

24 Q Do you have those pictures?

25 A I believe I do some where, yes.

1 Q Did you consult with anyone other than
2 Tony with regard to the potential cause of that
3 problem?

4 A I talked to everybody I knew that would
5 have a better input than I had myself. I called a
6 lot of people, a lot of friends in the industry to
7 figure out what and where the water came from.

8 Q Can you give me some of those names.

9 A Brett Jensen is a friend of mine that
10 builds in Island paperwork. I talked to him about
11 it. I talked to -- who else did I talk to? Rod
12 Jones is a realtor that spends some time up there.
13 That is the two off the top of my head that come to
14 mind.

15 Q Okay. Who was the roofer on the
16 project?

17 A Golden -- I can't remember the exact
18 name. But we went and tried to talk to them about
19 it as well, and they have since filed bankruptcy and
20 they are gone.

21 Q Had you used them before?

22 A That was the first time we had done a
23 shake roof, so no.

24 Q Were you aware of any other problems
25 with the home.

1 A No.

2 Q Do you have any recollection of when
3 the Magleby's would have completed their work on the
4 project?

5 A Specifically? I could not tell you the
6 date.

7 Q Do you have any records or anything
8 that you can look at that would refresh your memory
9 as to when the Magleby's would have completed work
10 on the project?

11 A The only thing I would have would be
12 the accounting stuff, if there was a final invoice,
13 or something of that sort. But I don't know for
14 sure even what the dates are there.

15 Q Were you aware of any agreement between
16 the Magleby's and my clients the Garn's?

17 It would have been outside of your
18 agreement with the Magleby's.

19 A I was told that they talked about
20 furniture and other things, but specifically I have
21 no idea.

22 Q Okay.

23 A I do know that Jill worked with them a
24 little bit on that stuff, but what the agreement was
25 with them, I do not know.

1 Q You were not a party to that at all?

2 A No.

3 Q Okay. Did you ever discuss that with
4 the Garn's at all?

5 A I don't believe so.

6 Q Okay. Do you know whether or not
7 anyone at Idaho Trademark Properties may have
8 discussed that with the Garn's?

9 A I could not say for sure.

10 Q Were there e-mails, faxes, that type of
11 communication between the partners of Idaho
12 Trademark Properties; the members of Idaho Trademark
13 Properties?

14 A I am sure there were some e-mails.

15 Q Would those still be on any computer
16 anywhere?

17 A I don't know.

18 Q Would they be on any computer that you
19 own?

20 A I am trying to think what e-mail I used
21 back then. Yeah, there is probably some of them.

22 Q Okay. Obviously one of the
23 difficulties is trying to put this thing back
24 together.

25 A I understand.

1 Q And in construction it seems to be
2 difficult because there is not a lot of writing back
3 and forth. So I am looking: Are there any other
4 documents that you can think of that would be
5 reflective of any agreement between you and the
6 Magleby's or Idaho Trademark Properties and the
7 Magleby's?

8 A I can't think of any documents, no.

9 Q And were you the one who suggested that
10 the Magleby's be brought in to the project.

11 A Yes.

12 Q And that was because of your prior
13 association with them?

14 A Yes.

15 MR. GAUCHAY: Nothing further.

16 MR. GARNER: Just a couple of
17 questions.

18 EXAMINATION

19 BY MR. GARNER:

20 Q Jenks Brothers, Inc. is no longer doing
21 business?

22 A No.

23 Q When was the last time that Jenks
24 Brothers, Inc. did any business?

25 A We helped build a house for my cousin a

1 year and a half ago.

2 Q Where was that?

3 A Rigby.

4 Q As we sit here today, what assets does
5 Jenks Brothers, Inc. own?

6 A A few shop tools, and that is about it.

7 Q Has Jenks Brothers, Inc. given any
8 property or tools or vehicles or anything like that
9 to the members or shareholders of a company?

10 A No.

11 Q Do you know if Jenks Brothers, Inc. is
12 involved in any other lawsuits?

13 A Apparently, we are not.

14 Q When was the last time you met with all
15 five members of Idaho Trademark Properties?

16 A I could not tell you for sure.

17 Q What other assets, besides the other
18 property in Silverhawk, does Trademark Properties
19 own?

20 A None.

21 Q With respect to the water damage to the
22 Garn house, you mentioned there was an issue of snow
23 load.

24 A Yes.

25 Q Would you describe what you saw when

1 you went up to the house.

2 A Well, we closed on the house the end of
3 November, beginning of December. I think this was
4 in February or March. I can't remember for sure
5 when.

6 But normally in that place, if there is
7 eight or ten feet of snow, you need to shovel your
8 roof. That is where -- a lot of people up there do
9 it. It's industry standard.

10 I am not saying -- because I've never
11 done one up there either. This was news to me. But
12 we had more or less a wall of snow sitting against a
13 wall. If you talk to people up there in years like
14 that, it's going to be an issue.

15 That is one of those things -- if you
16 own the property, I think you should probably
17 understand that that is one of the things on the
18 maintenance side that you're going to have to take
19 care of.

20 Q So it's your position that the home was
21 not being maintained?

22 A I know it was not maintained.

23 MR. GAUCHAY: Object to the form of the
24 question.

25 BY MR. GARNER:

1 Q Do you know if the house was being
2 maintained at this time?

3 A I did not believe it was.

4 Q Was there heat in the house?

5 A I don't remember when, but one time I
6 went up there and the propane was out of gas. I
7 think it was after the initial water damage.

8 Q When was Chris Magleby brought on to
9 the project?

10 A The beginning of the summer of 2007.
11 June or July, or somewhere in there.

12 Q At the time that Chris was brought on,
13 was Jill brought on at the same time.

14 A Selective Builders at that time, I
15 think, is who we were envisioning; and they worked
16 together. At least that was my understanding.

17 Q So when Chris was brought on, was it
18 your understanding that Jill was also being brought
19 on to the project?

20 A She would be working on the project
21 with him.

22 Q In the exhibits here, it shows that
23 approximately \$19,000 has been paid to Selective
24 Builders.

25 What is your understanding of why this

1 money was paid out to Selective Builders.

2 A For work performed. They did all the
3 trim, all the tile everything. And it was my
4 understanding they were paid in full for the
5 subcontract labor they performed other than the
6 management fee.

7 Q So, as we sit it here today, it's your
8 position that Selective Builders has been paid for
9 their labor; but not their management fee?

10 A Yes, all the specific tasks they
11 performed on the house, they have been paid for.
12 The management fee is the discrepancy.

13 Q Since the filing of this lawsuit have
14 you spoken with anyone from Trademark Properties
15 with regard to a management fee they paid to
16 Selective Builders?

17 A Since the lawsuit?

18 Q Yes, since the lawsuit was filed.

19 A I don't believe I have.

20 Q Have you thought about a proposal for a
21 resolution in this case?

22 A Yes, I have now.

23 Q Do you have a proposal?

24 A I have a proposal that I would be fine
25 with, but I am not going to say anything without the

1 other three members of Idaho Trademark Properties,
2 because it gets me in trouble.

3 MR. GARNER: Okay. Fair enough.

4 That's all I have.

5 MR. JOHNSON: I just have a couple of
6 things to follow-up on.

7 EXAMINATION

8 BY MR. JOHNSON:

9 Q You mentioned that you had your
10 offices, Jenks Brothers, with Idaho Trademark
11 Properties, where was that at?

12 A In the Forsgren building is where Jenks
13 Brothers was. Idaho Trademark properties was there
14 for a time with us. Then Idaho Trademark went to
15 Brady's house.

16 When Tony finished an office we went --
17 we moved out there, or Jenks Brothers.

18 Q How was the office physically divided,
19 if anything? I mean, I can envision some doctors'
20 offices. If you want Dr. A, you go to the left. If
21 you want --

22 A It's similar to that. They were on
23 opposite sides of the building.

24 Q So who would be physically located
25 there, that is who would have offices?

1 A Brady and Chris were in the Idaho
2 Trademark. Tony and I were in the Jenks Brothers.

3 Q Was there only two physical offices
4 itself?

5 A Yes, at the time.

6 Q Okay. You mentioned that your sister
7 Ashley was also involved. Was there an office for
8 her? Where was she physically located?

9 A She was in the Jenks Brothers' office.

10 Q So all three of you would be in one
11 room, in essence?

12 A Yes.

13 Q So, was there a conference room? If
14 you had this meeting with Idaho Trademark
15 Properties, where would you meet?

16 A If we met with Idaho Trademark
17 Properties we normally went to Bear World where Mike
18 Ferguson's office is.

19 Q You mentioned \$60,000 is what you would
20 be compensated for your general contracting
21 services?

22 A Yes.

23 Q Is it your understanding that has been
24 agreed on by other members of Idaho Trademark
25 Properties?

1 A That is not contracting fee money.
2 That is the bills that we paid and never got paid
3 for.

4 Q Okay. Nevertheless --

5 A Today, I would not fight -- I would not
6 fight for that \$60,000 because it would not be worth
7 it.

8 Q So would it be fair, just unstable
9 footing, of whether you get it or not?

10 A Yes, it's not worth the fight.

11 Q Now as far as the Magleby's, my
12 understanding is that the management fee was a one
13 and a half percent that you discussed?

14 A Yes.

15 Q In addition to that, they would be
16 compensated for the actual work they did?

17 A That's correct.

18 Q That would be the same arrangement as
19 in the Riverwood properties?

20 A Which portion of that are you referring
21 to? The management fee or the --

22 Q Both. I mean, they would be paid a
23 management fee of one and a half percent; but they
24 would also be paid for actual labor?

25 A Similar.

1 Q Okay. Now, as I look at these and what
2 I am envisioning is, I am -- when you say
3 townhouses, I am thinking somewhat tract-type
4 houses?

5 A Yes.

6 Q And you would kick out like cookie
7 cutters? Fairly standard? One would be patterned
8 after the other?

9 A Yes.

10 Q I am trying to be delicate about this.
11 I assume when you're dealing with a one and a half
12 million dollar house there is some different
13 expectations of a potential owner as to how that
14 house would be constructed?

15 A That's true.

16 Q And the quality of the material would
17 be substantially greater?

18 A True. Yes.

19 Q And the owner would be specifically
20 more involved to make sure that the motif or the
21 Franswa is accurate.

22 Would that be fair to say?

23 A Except for when we started the owner --
24 in essence, I was one of the owners -- I felt
25 comfortable with that, yes.

1 Q And the Garn's, you understand, are
2 from Utah?

3 A Yes.

4 Q Did you have any understanding that
5 they had certain expectations, or at least
6 expectations of their participation in
7 decision-making?

8 MR. GAUCHAY: Object to the form of the
9 question.

10 BY MR. JOHNSON:

11 Q Go ahead. There is no judge.

12 A Specific to the -- I am sure there was
13 expectations, yes. But I don't know if I was
14 involved in the process that much to --

15 Q Would you agree to disagree that making
16 decisions as to what to put in this type of house,
17 that is the Silverhawk house, would take longer
18 because of the type of house it was?

19 A Longer than townhomes?

20 Q Yes.

21 A Yes.

22 Q I mean, I assume in the townhouses you
23 put vinyl in, standard earth-tone colors?

24 A Yes.

25 Q Pretty standard?

1 A Yes.

2 Q Kind of off-the-shelf stuff?

3 A Yes.

4 Q And in the Silverhawk property, it's
5 custom --

6 A Yep.

7 Q -- stuff?

8 A Yes.

9 Q Now, I am going to try to help you out
10 a little bit on the \$1,500 issue.

11 Did you recall an issue about a siding
12 company refusing to do work?

13 A Yes.

14 Q Do you remember that they needed money
15 to be paid --

16 A Yes.

17 Q -- before they would go on.

18 A Yes.

19 Q Okay.

20 A I have a recollection of the siding
21 issue, yes.

22 Q Do you recall that the Magleby's paid
23 the sider to continue?

24 A I don't have a specific recollection,
25 but that does not surprise me.

1 Q Tony is over there nodding his head.

2 A That is entirely possible, yes.

3 Q Now, just to make sure that we're

4 clear: Would it be fair to say that the Magleby's

5 started to do the work without there being quote

6 what you refer to as a finalization of the

7 compensation?

8 A Yes.

9 Q And when they started the work, the

10 only conversation you had was the management would

11 be similar to what was previously done?

12 A Probably. That is probably true.

13 Q And are you aware of any communications

14 between Jill Magleby, the Garn's and Ashley your

15 sister related to the selection of materials and so

16 forth related to the Silverhawk property.

17 A Between Jill Garn -- I mean, between

18 Jill, the Garn's and my sister?

19 Q Yes.

20 A No. I don't know if Ashley had

21 anything to do with that. I have no recollection of

22 that.

23 MR. JOHNSON: Probably didn't desire to

24 have any. That's all I have.

25 EXAMINATION

1 BY MR. GAUCHAY:

2 Q Your sister, Ashley, where does she
3 live?

4 A Right now in Basin City, Washington.

5 Q She is married?

6 A She is married.

7 Q What is her husband's name?

8 A Mark.

9 Q Could you spell that last name again.

10 A M.O.L.L.O.T.T.E

11 MR. GAUCHAY: Thank you. Nothing
12 further.

13 MR. GARNER: All right. You're done.

14

15 (Deposition concluded at 11:30 wherein
16 reading and signing the transcript were waived.)

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF BONNEVILLE)

I, Karla Steed, RPR, RMR, CSR, and
Notary Public in and for the State of Idaho, do
hereby certify:

That prior to being examined BRANDON
JENKS, the witness named in the foregoing
deposition, was by me duly sworn to testify to
the truth, the whole truth, and nothing but the
truth;

That said deposition was taken down by
me in shorthand at the time and place therein
named and thereafter reduced to typewriting under
my direction, and that the foregoing transcript
contains a full, true and vebatim record of said
deposition.

I further certify that I have no
interest in the event of the action.

WITNESS my hand and seal this
_____ day of _____, 2010.

Karla Steed
Idaho CSR No. 755
Notary Public in and for
the State of Idaho

My Commission Expires: 8-21-12

Exhibit 4

Plaintiffs' Attorney Hours

Magleby v. Idaho Trademark Properties, LLC et. Al Fremont County Case CV-08-469


Date	Time	Description
3/7/2008	2:30:00	Preparation of Document: Claim of Lien
4/18/2008	0:42:00	Evaluation of Credit Reporting Issues Telephone call to client concerning case Letter to Jenk Brothers, Inc.
8/21/2008	0:30:00	Office Conference with client
9/8/2008	2:42:00	Office Conference with client Preparation of Document: Complaint
9/9/2008		Filing Fee
10/31/2008	0:12:00	Review of Notice of Appearance from Jenks Attorney, Telephone call to client concerning case
11/4/2008	0:36:00	Review of Jenks Brothers Answers
	0:45:00	Review of filings, Telephone conference with client, Correspondence (via email) to Opposing Attorneys Garn and Ehardt
11/12/2008	2:00:00	Review correspondence from client. Correspondence (via email) to Opposing Attorney Garn Preparation of Document: Notice of Intent to Take Default Correspondence (via email) to Opposing Attorney Ehardt Preparation of Document: Interrogatories and Request for Production of Documents
11/14/2008	0:24:00	Review of Idaho Trademark Properties' answer email to client and atty Garn
12/19/2008	0:24:00	Telephone conference with Kent Gauchay email to clients
1/19/2009	0:30:00	Review of file Place telephone call to client
1/29/2009	1:30:00	Review documents received from opposing party including Anser and Cross Claim. Preparation of Document: Interrogatories and Request for Production of documents
2/3/2009	0:30:00	Review of Discovery Requested from opposing side, forward to client with instructions
2/4/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Producton of Documents
2/10/2009	1:30:00	Review of client Office Conference with clients to discuss case, discovery and gathering of facts.
2/27/2009	2:12:00	Preparation of Document: Answer to Interrogatories and Responses to Request for Production
3/6/2009	0:30:00	Prepare modifications to Answers to Interrogatories and Responses to Request for Production.
3/7/2009	0:18:00	Letter to opposing attorney regarding rule 37 compliance
3/31/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for

		Production from Garns
5/13/2009		Title Search
5/14/2009	0:30:00	Office Conference with client to discuss case
7/6/2009	0:12:00	Conference with client regardless various issues
11/2/2009	1:40:00	Conference with client Letters to opposing attorneys to request dates for depositions and for IRCP 37 compliance for requiring supplemental answers to interrogatories and responses to request for discovery
11/30/2009	0:18:00	Review of file, Telephone call to client concerning case status
12/3/2009	0:30:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client Place telephone call to
12/14/2009	4:12:00	Conference with client Telephone conference with opposing attorney Garner Brief research Preparation of Document: Motion for Summary Judgment Preparation of Document: Affidavit of Chris Magelby Preparation of Document: Affidavit of Jill Magelby
12/16/2009	1:00:00	Prepare modifications to documents
1/12/2010	0:48:00	Prepare modifications to Summary Judgment documents, Set up hearing, Preparation of Document: Notice of Hearing
1/13/2010	0:30:00	Edit and modification of documents: Motion for Summary Judgment and Affidavits of Jill and Chris Magelby
2/1/2010	0:48:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client
2/8/2010	0:30:00	Review of Jenks response to Summary Judgment and Affidavits of Tony Jenks and Bradon Jenks
2/9/2010	0:18:00	Conference with client
2/16/2010	1:30:00	Review of file Place telephone call to Attorney Gauchay Place telephone call to Research - Sufficiency of Affidavits Review, Research issues raised by Jens Brothers Preparation of pleadings:
2/17/2010	0:24:00	Brief research on issue of insufficiency of lien based upon incorrect amount of claim Telephone call to client concerning case
2/23/2010	2:48:00	Preparation for Hearing Travel to St. Anthony (Split client) Court Appearance: Summary Judgment Hearing
2/26/2010	0:48:00	Telephone conference with client Letter to opposing attorney
3/8/2010	1:42:00	Prepare Subpoena for Jenks Brother Inc. Preparation of Document: Magleby's Second Set of Interrogatories and Request for Production of Documents
3/19/2010	0:36:00	Conference with Opposing Attorney Garn Telephone conference with client Prepare modifications to Notice of Depositions
3/29/2010	0:18:00	Review correspondence from client and Correspondence to Client via email
3/31/2010	3:36:00	Preparation for depositions Telephone conference with Fremont County Building Department Telephone conference with clients Review of Building Department Records

4/1/2010	1:12:00	Conference with client regarding deposition Final preparation
4/2/2010	3:48:00	Conference with clients Deposition of Brand Jenks Deposition of Tony Jenks
4/5/2010	0:30:00	Conference with Josh Gardner
4/6/2010	0:30:00	Preparation of pleadings: Note of Issue and Request for Trial Setting
4/15/2010		Deposition Costs for Tony and Brandon Jenks
4/21/2010	1:12:00	Preparation of Publication of Deposition of Tony Jenks, Start work on Publication of Deposition of Brandon Jenks
4/22/2010	2:30:00	Review of Deposition of Brandon Jenks, Preparation of Document: Partial Publication of Transcript of Dep. of Brandon Jenks Review of Summary Judgment Documents
5/18/2010	3:00:00	Preparation for Summary Judgment hearing
5/19/2010	1:30:00	Preparation for hearing
5/21/2010	4:24:00	Preparation for Oral Arguments Travel to and from St. Anthony Court Appearance: Motion for Summary Judgment
6/28/2010	0:30:00	Court Appearance - Status Conference
7/13/2010	0:48:00	Review of Summary Judgment Decision Telephone conference with client
8/4/2010	0:36:00	Review documents received from opposing party including Motion to Withdraw Preparation of Document: Notice of Intent to Appear Telephonically
8/13/2010	0:30:00	Letter to opposing attorney to comply with IRCP 37
8/18/2010	1:18:00	Preparation of pleadings: Motion to Compel and Affidavit
8/26/2010	1:00:00	Review Correspondence from opposing attorney Letter to opposing attorney with research of case
8/27/2010	1:00:00	Work on Settlement Letter
8/31/2010	2:36:00	Conference with client Brief Trial Preparation Preparation of Document: Witness and Exhibit List
9/1/2010	0:30:00	Edit and modification of document: Plaintiff's Witness and Exhibit List
9/2/2010	0:24:00	Review of documents from client, Telephone call to client concerning
9/3/2010	1:36:00	Prepare Hours of Work for Magleby's. Trial Preparation Prepare modifications to Plaintiff's Witness and Exhibit List
9/10/2010	3:00:00	Preparation of Default Documents, Calculation of Attorney Fees and Costs, and Interest
9/17/2010	0:18:00	Review of file and evaluate status of action against Garns Telephone Conference with Counsel for Opposing Party regarding case
9/23/2010:	1:18:00	Research issue on whether or not owner has independent standing to challenge contractual finding Review of case file for establishment of judgment and foreclosure against all defendants
9/27/2010	1:12:00	Preparation for Telephone conference Telephone conference with Court and opposing attorney Research

9/28/2010	3:06:00	Preparation of pleadings: Motion to Alter, Amend or Reconsideration
9/29/2010	1:00:00	Edit and modification of Motion to Alter, Amend or Reconsider
10/1/2010	1:30:00	Follow up with Motion for Reconsideration Telephone conference with Judge's law clerk and Kent Gauchay
10/4/2010	8:00:00	Telephone conference with Court and opposing attorney to argue Motion to Alter, Amend, or Reconsider. Telephone conference with opposing attorney. Trial Preparation
10/5/2010	5:00:00	Travel to and from St. Anthony Court Appearance: Trial
10/7/2010	1:30:00	Research issues related to equitable relief when express contract exists Research issues related to attorney fees in foreclosure and 12-123. Conference with Dale Thomson, attorney for Fergusons
10/8/2010	3:30:00	Preparation of pleadings: Motion for Attorney Fees and Costs Preparation of Document: Memorandum in Support of Attorney Fees and Costs Telephone conference with Opposing Attorney Telephone conference with client
TOTAL	100.92	

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; display: inline-block;">OCT 15 2010</div> ABBIE MACE, CLERK By:  Deputy Clerk

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

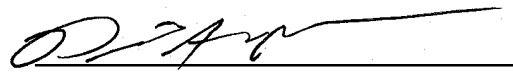
Defendants.

Case No: CV-08-469

**MOTION FOR ENTRY OF
JUDGMENT, DECREE OF
FORECLOSURE AND ORDER
OF SALE**

David A. Johnson, attorney for Plaintiffs hereby moves the Court for entry of its Judgment, Decree of Foreclosure and Order of Sale in a form similar to Exhibit A attached. This Motion is based upon the Court's Order Granting in Part Plaintiff's Motion for Partial Summary Judgment dated July 12, 2010, and Default Judgment dated September 27, 2010 and Idaho Code §6-101 and other pleadings and orders herein.

DATED: October 14, 2010


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

1- MOTION FOR ENTRY OF JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 14, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Courthouse Box

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440


Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho 83440

Mail

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

EXHIBIT A

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**JUDGMENT, DECREE OF
FORECLOSURE AND ORDER OF
SALE**

On November ___, 2010, the above entitled matter came before the Court on the Plaintiff's Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale. After consideration, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Judgment is hereby entered in favor of Plaintiffs and against Defendants in the sum of \$ _____ lawful money of the United States, with interest thereon at the lawful rate of interest from date hereof until paid for

1- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

which Execution may issue. This judgment is based upon the following calculations:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,533.00 ¹
Attorney Fees		T.B.D.
Court Costs		T.B.D.
Total Judgment		T.B.D.
Less Sum Previously Paid	\$	0.00
Final Judgment		T.B.D.

2. The Court Decrees that Plaintiffs have a Mechanics and Materialmen's Lien pursuant to Idaho Code §45-501 et. Seq. against the real property located at 3635 Redtail Street, Island Park, Idaho (Subject Property), more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1,
Division 3, Fremont County, Idaho
3. Plaintiffs are entitled to foreclose their lien by Sheriff's sale. The Sheriff of Fremont County, Idaho is ordered to sell the property described in the preceding paragraph and apply the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the Plaintiffs.

DATED: November ____, 2010

Darren B. Simpson

¹ Interest as of September 27, 2010, the date of entry of the Default Judgment.

NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled Court and that I mailed a true copy of the foregoing document(s) on November ____, 2010, to the following attorney(s) of record and/or parties:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

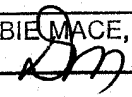
Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho 83440

David A. Johnson
Wright, Johnson, Tolson & Wayment
P.O. Box 52251
Idaho Falls, ID 83405-2251

Clerk of the Court

By: _____

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; text-align: center;">OCT 15 2010</div> ABBIE MACE, CLERK By:  Deputy Clerk

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

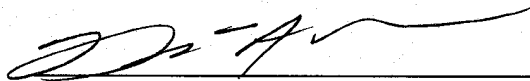
Defendants.

Case No: CV-08-469

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named Plaintiffs will call up for hearing their Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale, Motion for Costs and Attorney Fees and Motion to Set Aside Default and Default Judgment, on November 12, 2010, at the hour of 2:00 p.m., before the Honorable Darren B. Simpson, at the Fremont County Courthouse, 151 W. 1st North, St. Anthony, Idaho.

DATED: October 14, 2010



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled Court and that I mailed a true copy of the foregoing document(s) on November ____, 2010, to the following attorney(s) of record and/or parties:

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho 83440

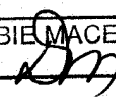
David A. Johnson
Wright, Johnson, Tolson & Wayment
P.O. Box 52251
Idaho Falls, ID 83405-2251

Clerk of the Court

By:_____

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

DISTRICT SEVEN COURT	
County of Fremont State of Idaho	
Filed:	
OCT 15 2010	
ABBIE MACE, CLERK	
By: 	Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

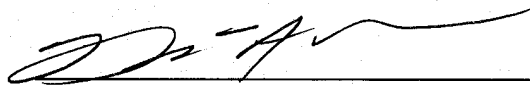
Defendants.

Case No: CV-08-469

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named Plaintiffs will call up for hearing their Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale, Motion for Costs and Attorney Fees and Motion to Set Aside Default and Default Judgment, on November 12, 2010, at the hour of 2:00 p.m., before the Honorable Darren B. Simpson, at the Fremont County Courthouse, 151 W. 1st North, St. Anthony, Idaho.

DATED: October 14, 2010


WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 14, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Courthouse Box

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

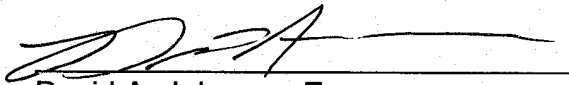
Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho 83440

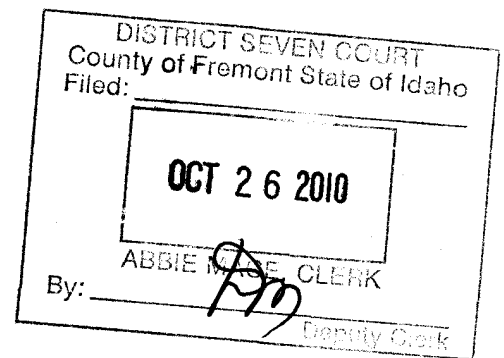
Mail

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail


David A. Johnson, Esq.

Kent W. Gauchay, Esq. I.S.B. #2709
SIMPSON & GAUCHAY
Attorneys at Law
497 N. Capital Ave., Ste. 200
P. O. Box 50484
Idaho Falls, ID 83405-0484
Telephone: (208) 523-2000



Attorney for Defendants Kevin and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN,
husband and wife, IDAHO
TRADEMARK PROPERTIES, LLC,
JENKS BROTHERS, INC., and DOES
1-10,

Defendants.

Case No. CV-08-469

**MOTION TO DISALLOW
ATTORNEY FEES AND COSTS**

COMES NOW Defendants Kevin and Tanya Garn (hereafter the Garns), by and through counsel of record, Kent W. Gauchay, and pursuant to I.R.C.P. 54(e)(6) and 54(d)(6), and supported by the Memorandum attached and filed herewith, move this Court for an order disallowing Plaintiffs' Motion for Costs and Attorney Fees sought against the Garns. The Garns object as follows:

1. Plaintiffs are seeking attorney's fees in part for claims that were unsuccessful such as their contract claim and their unjust enrichment claim, and attorney's fees should not be awarded for claims of which the Plaintiffs were not the prevailing party.

1. MOTION TO DISALLOW ATTORNEY FEES AND COSTS

2. The two provided reasons for Plaintiffs' motion are both directed at ITP, namely, 1) that the Plaintiffs were the prevailing party pursuant to summary judgment and recent proceedings and, 2) that ITP's defense in this case was frivolous. These arguments do not apply to the Garns. Furthermore, most of the hours billed according to Exhibit 4 were for the case between The Plaintiffs and ITP.

3. Plaintiffs use of *Olsen v. Rowe* to argue that Idaho Code §45-513 mandates an award of attorney's fees not allowable by Rule 53(e) ignores that the Court still has discretion as to the amount of attorney fees and may consider the factors of I.R.C.P. 54(e)(3) and the prevailing party analysis. The Plaintiffs failed to take these considerations into account in their memorandum and when properly considered, show that the Plaintiffs are not entitled to their claim for attorney fees and costs.

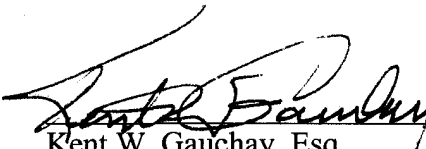
4. The Plaintiffs are causing excessive litigation in this matter, using inapplicable statutes in an attempt to get fees and costs that are not attributable to litigation between the Plaintiffs and the Garns.

WHEREFORE, the Defendants Kevin and Tanya Garn ask for an order:

1. Disallowing attorney fees and costs to Plaintiffs as said request pertains to Defendant's Garns.

DATED this 25th day of October, 2010.

SIMPSON & GAUCHAY


Kent W. Gauchay, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

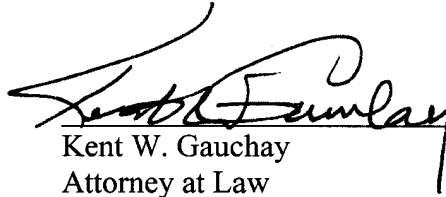
I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 25 day of October, 2010, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

DOCUMENT SERVED: **MOTION TO DISALLOW ATTORNEY FEES AND COSTS**

PERSON SERVED: David A. Johnson, Esq.
 Wright, Johnson, & Wayment
 477 Shoup Avenue, Ste 109
 PO Box 52251
 Idaho Falls, ID 83405

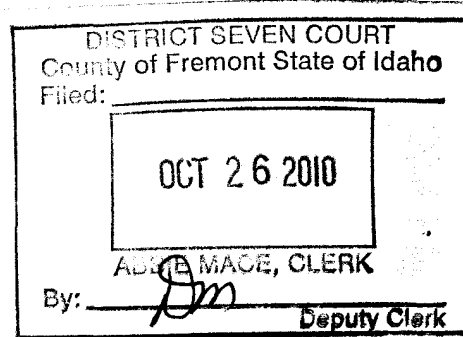
Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, # 205
Blackfoot, ID 83221-1700

- ☐ Hand Delivered
- ☒ Mail
- ☐ Fax



Kent W. Gauchay
Attorney at Law

Kent W. Gauchay, Esq. I.S.B. #2709
SIMPSON & GAUCHAY
Attorneys at Law
497 N. Capital Ave., Ste. 200
P. O. Box 50484
Idaho Falls, ID 83405-0484
Telephone: (208) 523-2000



Attorney for Defendants Kevin and Tanya Garn

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN,
husband and wife, IDAHO
TRADEMARK PROPERTIES, LLC,
JENKS BROTHERS, INC., and DOES
1-10,

Defendants.

Case No. CV-08-469

**MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW
ATTORNEY FEES AND COSTS**

COMES NOW Defendants Kevin and Tanya Garn (hereafter the Garns), by and through counsel of record, Kent W. Gauchay, and hereby submit this Memorandum in Support of Motion to Disallow Attorney Fees and Costs.

A. THE PLAINTIFFS SEEK ATTORNEY FEES AND COSTS FOR CLAIMS ON WHICH THEY WERE NOT THE PREVAILING PARTY.

Based on Idaho Code Section 12-120(3), an award of attorney fees is mandatory to the prevailing party in certain types of actions including actions arising out of any commercial transaction. The determination of whether a litigant is the prevailing party is up to the discretion

of the trial court.¹ I.R.C.P. 54(d)(1)(B) provides that the trial court must consider the following three factors in order to determine which party prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues.

In *Sainsbury Construction Co., v. Quinn*, the Idaho Court of Appeals upheld a judgment that Sainsbury Construction Co. was the prevailing party in a case in which they won only one of multiple claims. However, in that case, the Court determined that Sainsbury Construction Co.'s success on the breach of contract claim resulted in a full loss for the Quinns and the additional claims were unnecessary to address.

This case is substantially different in that the Plaintiffs' win on the foreclosure claim does not amount to a total win, and that the Plaintiffs' other claims were addressed and denied. The Plaintiffs were not successful on their unjust enrichment claim, against Garn. Plaintiff was successful only in showing that they were entitled to a materialman's lien upon the property, even though the amount owed is in dispute. Additionally the court has already dealt with the issue of attorney fees against Jenks Brothers and Idaho Trademark Properties in a default judgment. Applying the three I.R.C.P. 54(d)(1)(B) factors, the Plaintiffs should not be determined to be the prevailing party against Garn and should not be entitled to attorney fees.

B. PLAINTIFFS' MOTION IS BASED ON REASONS INAPPLICABLE TO THE GARNES AND BASED ON ATTORNEY FEES INCURRED IN LITIGATION AGAINST THE OTHER DEFENDANTS.

Aside from their prevailing party theory, the Plaintiffs base their argument for attorney fees and costs on ITP's defense in this case. Plaintiffs also base the amount of attorney fees and costs on the default by ITP and expenses incurred in litigation with ITP. These arguments do not

¹ *Sainsbury Construction Co., v. Quinn*, 137 Idaho 269, 47 P.3d 772 (Idaho App. 2004).

apply to the litigation between Plaintiffs and the Garns. Defendant Garns should not be held responsible for attorney fees that they had nothing to do with.

C. PLAINTIFFS' ARGUMENT THAT IDAHO CODE § 45-513 REQUIRES AN AWARD OF ATTORNEY FEES AGAINST THE GARNs IGNORES THE APPLICABLE FACTORS.

Plaintiffs' Memorandum quoted *Olsen v. Rowe*, in which the Court of Appeals stated that to the extent that Rule 53(e) is inconsistent with Idaho Code § 45-513, the rule has no application and an award of attorney fees are mandatory. Plaintiffs' Memorandum also states that according to that case, the court is still able to use its discretion in such an award and is "free to consider the factors of I.R.C.P. 54(e)(3) as well as those considerations which are part of the prevailing party analysis under I.R.C.P. 54(d)(1)(B)."² Accordingly, use of Idaho Code §45-513 to gain an award of attorney fees does not eliminate the court's discretion under the prevailing party analysis.

As discussed above, under these factors it is not certain that the Plaintiffs are the "prevailing party" and certainly, the extent to which they prevailed on their claims do not warrant a full award of attorney fees and costs. Use of Idaho Code §45-513 to gain an award of attorney fees does not eliminate the court's discretion under the prevailing party analysis.

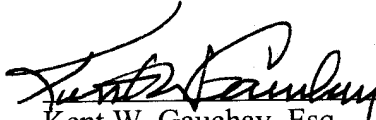
CONCLUSION

For the forgoing reasons, Defendants Kevin and Tanya Garn ask that the Plaintiffs' Motion For Costs and Attorneys Fees be dismissed against the Garns.

² See Plaintiffs' Memorandum p. 2, quoting *Olsen v. Rowe*, 125 Idaho 686, 689, 873 P.2d 1340, 1343 (Idaho App., 1994).

DATED this 25 day of October, 2010.

SIMPSON & GAUCHAY


Kent W. Gauchay, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

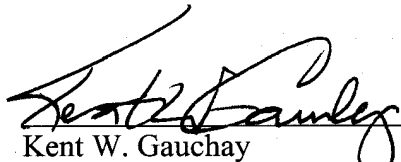
I HEREBY CERTIFY that I am a licensed attorney in the State of Idaho, with my office in Idaho Falls, and that on the 25 day of October, 2010, I served a true and correct copy of the following described document on the person listed below by the method indicated below.

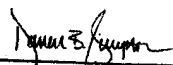
DOCUMENT SERVED: **MEMORANDUM**

PERSON SERVED: David A. Johnson, Esq.
Wright, Johnson, & Wayment
477 Shoup Avenue, Ste 109
PO Box 52251
Idaho Falls, ID 83405

Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, # 205
Blackfoot, ID 83221-1700

- ☐ Hand Delivered
☒ Mail
☐ Fax


Kent W. Gauchay
Attorney at Law

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO
October 11, 2010
AT 9:21 a.m.

DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

MINUTE ENTRY

This matter came before the Court on the 4th day of October 2010, for the purpose of Plaintiffs' Motion to Reconsider, the Honorable Darren B. Simpson presiding.

Ms. Sandra Beebe, Court Reporter and Ms. Marielle Pratt, Deputy Clerk were present. Mr. David Johnson, Esq., appeared telephonically on behalf of the plaintiffs. Mr. Kent Gauchay, Esq., appeared telephonically on behalf of defendants Garn.

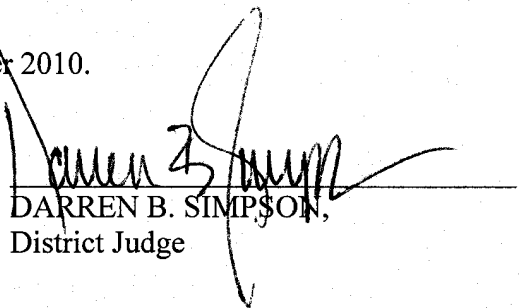
Court and counsel discussed the status of the case. Argument and response were presented by counsel regarding the motion to reconsider.

The Court DENIED Plaintiff's Motion to Reconsider.

Court Trial shall commence on October 5, 2010 at 9:00 a.m.

Court was thus adjourned.

DATED this 27th day of October 2010.


DARREN B. SIMPSON,
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MINUTE ENTRY was personally delivered faxed or mailed by first-class U.S. Mail with pre-paid postage on this 20th day of October 2010 to the following:

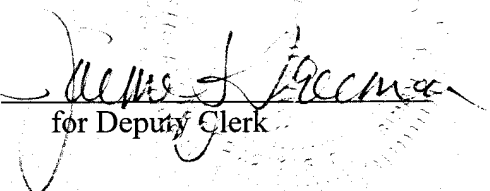
David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By: 
for Deputy Clerk

October 27, 2010
AT 9:21 a.m.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY dba
SELECTIVE BUILDING,

Plaintiffs,

-vs-

KEVIN AND TANYA GARN, husband
and wife; IDAHO TRADEMARK
PROPERTIES, LLC.; JENKS BROTHERS
INC., and DOES 1-10

Defendants.

CASE No. CV-2008-469

MINUTE ENTRY – Court Trial

This matter came before the Court on Tuesday, October 4, 2010, for the purpose of a Court Trial, the Honorable Darren B. Simpson, presiding.

Ms. Debby Mace, Deputy Court Clerk was personally present. Ms. Sandra Beebe, Court Reporter was personally present.

David A. Johnson, Esq., appeared in person with Plaintiffs, Christopher and Jill Magleby dba Selective Builders. Josh Garner, Esq., appeared in person on behalf of Idaho Trademark Properties, LLC and Jenks Brothers, Inc. Kent Gauchay, Esq., appeared in person on behalf of defendant, Kevin Garn.

Mr. Johnson argued on his Motion to Shorten Time.

Mr. Gauchay commented that he had not received the Motion to Set Aside and further commented on his uncertainty of which part of the rule Mr. Johnson was relying on. Mr. Gauchay commented on the need to re-notice to the defendants and feels the need to re-brief the issues.

Mr. Johnson responded to the issue of notice needing to be given to the defendant and why he feels that was appropriate and no further notice was needed. Mr. Johnson stated the parties involved knew of the Court Trial date.

Mr. Gauchay went over the rules.

The Court stated the issue at hand was to determine if it can shorten time.

Minute Entry

The Court commented that the Notice of Default Judgment is provided to parties whom judgment is being entered against. The Court further commented on the procedure of giving notice and ruled that Mr. Johnson could argue his Motion to Set Aside Default.

Mr. Johnson proceeded to argue the Motion to Set Aside Default under I.R.C.P. Rule 65(b), with clarification of sub section 1 and 6.

The Court went over understanding of Rule 65(b) and commented on First Court v. Keller case law.

Mr. Gauchay felt the issue difficult to argue and that Mr. Johnson is trying to re-argue the case since he was not awarded the attorney fees he asked for. Mr. Gauchay did not feel any reasons under IRCP 60(b) apply and asked for the motion to be denied.

Mr. Johnson responded that he is trying for an expeditious end to the case.

The Court commented on IRCP Rule 60(b), Rule 55(c) and went over the issue of the defaulting party not being present and provisions being applicable. Commented on parentheses and that one does not apply. In addition, the Court understands that quandary of attorney fees.

The Motion to Set Aside Default is denied.

Mr. Gauchay motioned the Court to dismiss the matter and provided argument. Cited Manoes v. Moss case law and felt unjust enrichment needs to be denied. Mr. Gauchay moved for dismissal or at least to be held in abeyance.

The Court inquired.

Mr. Gauchay commented on 109 ID 737 case law and felt Mr. Johnson should have brought up the issues in writing before now. Mr. Gauchay was uncomfortable raising issues before now and proceeded with his reasoning's.

The Court asked as to date Default Judgment was signed. It was signed on September 22, 2010. Mr. Gauchay stated it was Mr. Johnson that submitted to the Court that this case was over.

The Court took under advisement the Motion to Dismiss. Mr. Johnson and Mr. Gauchay may submit briefs.

Mr. Johnson stated he wants to go over issues in a Court Trial. He wants to argue Rule 56(D), Summary Judgment and also certain admissions in the Complaint to be established; particularly paragraphs 8 and 13, the admission of the property being sold and the price.

Mr. Gauchay clarified his answer.

The Court Trial proceeded. Mr. Johnson called Mr. Chris Magleby as his first witness. Mr. Magleby is sworn in and proceeded with testimony on direct. Mr. Johnson asks for Plaintiffs Exhibit #1 and #2 to be marked. Exhibits are 2007 and 2008 tax filing documents. They are admitted without objection from Mr. Gauchay.

Also marked is Plaintiff's Exhibit #3 and #4. Plaintiffs Exhibit #4 is identified as a budget worksheet of the plaintiff. Mr. Johnson moves for the admission of Plaintiff's Exhibit #4. Mr. Gauchay objected. The Court allowed Plaintiffs Exhibit #4 to be admitted.

Mr. Johnson asks for Exhibit #5 to be marked. Plaintiffs Exhibit #5 will be marked. It is identified as hours worked on the Silver Hawk Cabin belonging to the Garns. Mr. Johnson moves for the admission of Plaintiffs Exhibit #5 for illustrative purposes. Mr. Gauchay objected to the exhibit and the Court sustained the objection. Mr. Gauchay continued to object as to witness testimony as to value of property. The Court overruled the objections. Mr. Johnson proceeded with direct. Mr. Gauchay continued to object, stating the witness is not an expert in appraisals and property value.

Mr. Johnson commented on the Objection.

The Court then took a 10 minute recess.

After the recess, the Court advises Mr. Johnson that he may need expert witness testimony as to real estate values. Mr. Johnson stated that the value of the property has been established by admission. Mr. Gauchay then made a motion as to Unjust Enrichment and for the matter to be dismissed.

The Court denied the continuance of the trial as to the Unjust Enrichment issue and granted the Motion to Dismiss against the Garns. The Court asked for briefs to be filed and commented on proceeding with live testimony or affidavits of the defaulted defendants.

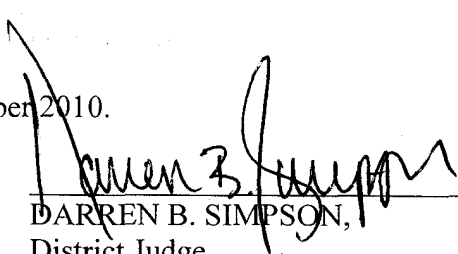
Mr. Gauchay expressed concern of filing a legal brief that would cause a greater judgment against his clients. Mr. Johnson is to submit a brief by October 8, 2010. Mr. Gauchay will then have 10 days to respond and file a brief. Mr. Johnson will have an additional 10 days after that to file an Objection after Mr. Gauchay has responded.

The Court will notify counsel after it has made a decision on the pending issues. The Court entered a Default against Idaho Trademark Properties and Jenks Brothers establishing amount entitled to is amount in foreclosure. The Order previously entered in is effect.

The Court addressed Mr. and Mrs. Magleby.

Court was thus adjourned.

DATED this 26TH day of October 2010.



DARREN B. SIMPSON,
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MINUTE ENTRY** was personally delivered, faxed or mailed by first-class U.S. Mail with pre-paid postage on this 25th day of October 2010 to the following:

David Johnson, Esq.
Wright, Johnson, Tolman & Wayment PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Kent Gauchay, Esq.
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

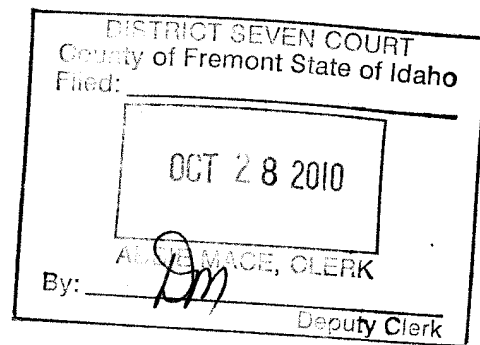
Joshua A. Garner, Esq.
The Law Office of Joshua A. Garner, PLLC
PO Box 1014
Rexburg, ID 83440

☒ U.S. Mail ☐ Courthouse Box ☐ Facsimile

ABBIE MACE, CLERK

By:  for Deputy Clerk

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

AMENDED NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named Plaintiffs will call up for hearing their Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale, Motion for Costs and Attorney Fees and Motion to Set Aside Default and Default Judgment, AND Defendant Garns Motion to Disallow Attorney Fees and Costs on November 12, 2010, at the hour of 2:00 p.m., before the Honorable Darren B. Simpson, at the Fremont County Courthouse, 151 W. 1st North, St. Anthony, Idaho.

DATED: October 26, 2010

A handwritten signature in black ink, appearing to be "DA Johnson", written over a horizontal line.

WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on October 26, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Facsimile (208)522-4295

Idaho Trademark Properties, LLC
c/o Dale P. Thomson, Attorney
PO Box 609
Rexburg, ID 83440

Mail

Idaho Trademark Properties, LLC
c/o Brady Gardner, Manager
366 Talon Dr
Rexburg, ID 83440

Mail

Jenks Brothers Inc
Brandon Jenks/Tony Jenks
3680 Mountain View Drive
Rexburg, Idaho 83440

Mail

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Mail



David A. Johnson, Esq.

DISTRICT SEVEN COURT
County of Fremont State of Idaho
Filed: NOV 12 2010
By: _____ Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY, CLERK
MINUTE ENTRY

STATE OF IDAHO)
Plaintiff,)
Vs.)
)
)
)
Defendant)
_____)

MINUTE ENTRY

JUDGE:	DARREN B. SIMPSON
REPORTER:	SANDRA BEEBE
DATE:	NOVEMBER 12, 2010
CASE:	CV2008-469
CLERK:	DEBORAH MACE
HEARING:	MOTIONS
ATTORNEY:	DAVID JOHNSON-PLAINTIFF
	KENT GAUCHAY-GARNS
	JOSH GARNER-SELECTIVE BUILDERS

DISK 32

205 MAGLEBY VS GARN

206 MOTION FOR ATTORNEY FEES AND MOTION FOR ORDER FOR
207 COSTS. MOTION TO SET ASIDE WAS DENIED PREV.

205 MR JOHNSON PROCEEDS WITH ARGUMENT.
COMMENTS ON FORCLOSURE AND DEFAULT MATTER.
ISSUES WERE MERGED TOGETHER.
MR. GAUCHEY COMMENTS ON WHAT PLAINTIFFS ARE ENTITLED TO.
MR JOHNSON COMMENTS ON COURTS ORDER ALLOWING FORCLOSURE
MR THOMSON IS NEW TO THE CASE. FEELS THAT MATTER IS
BETWEEN GARN AND MAGLEBY, IDAHO TRADEMARK AMOUNT HAS
ALREADY BEEN ESTABLISHED. DOES NOT KNOW IF GARN WANTS
TO STIP TO AMOUNT. A RULING NEEDS ENTERED AS TO HOW
MUCH FORCLOSURE IS FOR.
THE COURT COMMENTS ON AMOUNT OF LIEN FORCLOSURE.
MR JOHNSON SAYS DEFAULT TOOK PLACE AFTER SUMM JUDGMENT
23,500.00 WAS PRINCIPAL AMOUNT. UNJUST ENRICHMENT WAS
DISMISSED AGAINST GARNS.
THE COURT ASKS MR JOHNSON STATUS OF CASE. FEELS THE
AMOUNT OF ATTORNEY FEES NEED TO BE ESTABLISHED.
THE COURT ASKS IF FORCLOSURE CAN HAPPEN WITH DEFAULT
OF ITP. MR JOHNSON COMMENTS ON WHAT THE AMOUNT OF
FORCLOSURE COULD BE.
MR GAUCHEY COMMENTS ON COSTS AND ATTORNEY FEES.

I hereby certify that the above is a true and accurate record of the hearing minutes.

FEELS MR JOHNSON IS NOT HAPPY WITH ATTORNEY FEES.
IN DEFAULT ARE PRINCIPAL AMOUNT, INTEREST ACRUED COSTS
ATTORNEY FEES. IF THAT IS WHAT HE IS SAYING IS UNSURE
WHY WE ARE HERE.

- 214 THE COURT FEELS MR JOHNSON HAS TWO DIFFERENT THEORIES.
MR JOHNSON WILL ARGUE COSTS OF ATTORNEY FEES.
THE COURT INQUIRES AS TO WHAT MR JOHNSON IS SEEKING.
UNDER TITLE 45. THE COURT ASKS IF THAT IS NOT TO BE
BALANCED UNDER RULE 34.
ASKED FOR FORCLOSURE AND CONTRACT.
MR JOHNSON FEELS FEES ARE JUSTIFIED.
COMMENTS ON OBJECTION FILED BY MR THOMSON, STATES
OBJECTION IS UNTIMELY.
- 223 MR GAUCHAY PROCEEDS WITH REBUTTAL.
PLAINTIFFS ALLEGED LIEN CAUSE OF ACTION, BREACH OF
CONTRACT AND UNJUST ENRICHMENT.
IN REG. TO CONTRACT IS TO SECOND DEF, NOT HIS CLIENT
UNJUST ENRICHMENT CLAIM STATES THE COURT RULED AGAINST
MR JOHNSON ON THIS CLAIM. ON LIEN CLAIM WILL CONCEED
ATTORNEY FEES MAY BE AWARDED, BUT IF THOSE FEES ARE
AWARDED CANNOT USE AMOUNT OF DEFAULT JUDGMENT ON AMOUNT
OF FORCLOSURE. FEELS MR JOHNSON IS TRYING TO GET MORE
ATTORNEY FEES.
THREE CAUSES OF ACTION NEED TO BE LOOKED AT HOW THEY
APPLY TO THE GARNES.
RECORD WILL SHOW MR GAUCHEY DID NOT OPPOSE SUMMARY
JUDGMENT.
MR GAUCHAY STATES HIS INVOLVMENT HAS BEEN VERY LIMITED.
54(E)3 FACTORS ARE CITED. DOES NOT FEEL MR JOHNSON IS
ENTITLED TO ANY MORE ATTORNEY FEES.
- 233 MR THOMSON ON RESPONSE TO TIMELINESS ISSUE.
MR THOMSON INDICATES COURT RECORD IS CLEAR THAT NONE OF
DOCUMENTS MR JOHNSON WERE LEGALLY SERVED ON IDAHO TRADE
MARK PROPERTIES.
- 234 THE COURT ASKS IF PARTY FAILED TO APPEAR THAT DEFAULT
CAN BE TAKEN WITHOUT FURTHER NOTICE. MR THOMSON STATES
ONCE JUDGMENT WAS ENTERED MR JOHNSON WAS REQUIRED TO
GIVE NOTICE, SHOULD HAVE SERVED REGISTERED AGENT.
- 235 THE COURT STATES FINAL JUDGMENT HAS NOT BEEN ENTERED
YET. MR THOMSON RESPONDS. HIS CLIENTS CASE WAS A FINAL
JUDGMENT. THE COURT COMMENTS ON APPEAL AND WHAT THE
SUPREME COURT WOULD HAVE RULED.
ARGUMENT ON ATTORNEY FEES. STATES NO DEPOSITION WAS
EVER TAKEN AGAINST IDAHO TRADEMARK PROPERTIES, JUST
JENKS. IS IN OPPOSITION TO ATTORNEY FEES.
- 242 MR JOHNSON REBUTTAL. PRAYER OF RELEIF IS JUDGMENT FOR
ALL ATTORNEY FEES AND COURT COSTS, DIRECTING FREMONT
COUNTY TO FORCLOSE.
COMMENTS ON THE FACT THAT NO STIPULATION WAS EVER
ENTERED BY DEFENDANTS.
THE COURT WILL TAKE MATTER UNDER ADVISEMENT AND RENDER

I hereby certify that the above is a true and accurate record of the hearing
minutes.

A DECISION AS SOON AS POSSIBLE
COURT IS ADJOUNED.

I hereby certify that the above is a true and accurate record of the hearing minutes.

CV-2008-0000469

Christopher J Magleby, etal. vs. Kevin Garn, etal.

Hearing type: Hearing-Motions-Judgment-Foreclosure-Cost

Hearing date: 11/12/2010

Time: 2:00 pm

Judge: Darren B. Simpson

Courtroom:

Court reporter: Sandra Beebe

Minutes Clerk: MACE

Disk Number: 32

Party: Idaho Trademark Properties, Attorney: Dale Thomson

Party: Christopher Magleby, Attorney: David Johnson

Party: Kevin Garn, Attorney: Kent Gauchay

COURT MINUTES

DISTRICT SEVEN COURT County of Fremont State of Idaho Filed: <div style="border: 1px solid black; padding: 5px; text-align: center;">NOV 12 2010</div> By: _____ Deputy Clerk

205 COURT CONVENES

HEARING ON MOTION FOR ATTORNEY FEES AND COSTS, AND FORCLOSURE.

THE COURT COMMENTS ON MOTION TO SET ASIDE BEING DENIED AT A
PREVIOUS HEARING.

MR. JOHNSON PROCEEDS WITH ARGUEMNT IN SUPPORT OF HIS MOTION FOR
FEES AND COSTS AND FORECLOSURE.

MR. GAUCHAY COMMENTS ON WHAT HE FEELS PLAINTIFFS ARE ENTITLED
TO.

MR. JOHNSON COMMENTS ON THE COURTS ORDER ALLOWING FORECLOSURE.

MR. THOMSON IS NEW TO THE CASE. HE FEELS THAT THE MATTER IS

BETWEEN GARNES AND MAGLEBY'S. IDAHO TRADEMARK AMOUNT HAS ALREADY BEEN ESTABLISHED. IS UNSURE IF GARN'S WANT TO STIPULATE TO AMOUNT. MR. THOMSON FEELS A RULING NEEDS ENTERED AS TO HOW MUCH THE FORECLOSURE AMOUNT IS FOR.

THE COURT COMMENTS ON THE AMOUNT OF LIEN FORECLOSURE.

MR. JOHNSON STATES THAT DEFAULT TOOK PLACE AFTER SUMMARY JUDGMENT. \$23,500.00 WAS PRINCIPAL AMOUNT. THE UNJUST ENRICHMENT WAS DISMISSED AGAINST THE GARNES.

THE COURT ASKS MR. JOHNSON AS TO STATUS OF THE CASE. MR. JOHNSON FEELS THE AMOUNT OF ATTORNEY FEES NEED TO BE ESTABLISHED.

THE COURT ASKS IF FORECLOSURE CAN HAPPEN WITH THE DEFAULT OF ITP. MR. JOHNSON COMMENTS ON WHAT THE AMOUNT OF THE FORECLOSURE COULD BE.

MR. GAUCHAY COMMENTS ON THE AMOUNT OF COSTS AND ATTORNEY FEES. HE FEELS MR. JOHNSON IS NOT HAPPY WITH THE AMOUNT AND CONTINUES TO HAVE HEARINGS UNTIL HE IS SATISFYED.

MR. JOHNSON ARGUES COSTS AND ATTORNEY FEES. THE COURT ASKS MR. JOHNSON IS SEEKING UNDER TITLE 45.

MR. JOHNSON OBJECTS TO THE LATE FILING OF MR. THOMSON IN REFERENCE TO OBJECTION TO FEES. HE FEELS THAT WAS NOT MADE IN A TIMELY MANNER.

MR. GAUCHAY PROCEEDS WITH REBUTTAL. THE PLAINTIFF'S ALLEGED LIEN CAUSE OF ACTION, BREACH OF CONTRACT AND UNJUST ENRICHMENT. STATES THE CONTRACT IS TO SECOND DEFENDANT, NOT TO HIS CLIENT. THE UNJUST ENRICHMENT CLAIM STATES THE COURT RULED AGAINST MR. JOHNSON ON THIS CLAIM. ON THE LIEN CLAIM, MR. GAUCHAY STATES HE WILL CONCEDE ATTORNEY FEES MAY BE AWARDED, BUT IF THOSE FEES ARE AWARDED, THE AMOUNT OF DEFAULT CANNOT BE USED ON FORECLOSURE. MR. GAUCHAY STATES THREE CAUSES OF ACTION NEEDS TO BE LOOKED AT HOW THEY APPLY TO THE GARNES. HE STATES THE RECORD WILL SHOW HE DID NOT OPPOSE THE SUMMARY JUDGMENT. MR. GAUCHAY STATES HIS INVOLVEMENT IN THIS CASE HAS BEEN VERY LIMITED.

MR. THOMSON ADDRESSES THE TIMELENESS ISSUE. HE STATES THE RECORD IS CLEAR THAT NONE OF THE DOCUMENTS WERE LEGALLY SERVED ON

IDAHO TRADEMARK PROPERTIES.

THE COURT STATES THAT IF A PARTY FAILED TO APPEAR, THAT DEFAULT CAN BE TAKEN WITHOUT FURTHER NOTICE. MR. THOMSON STATES THAT ONCE JUDGMENT WAS ENTERED, MR. JOHNSON WAS REQUIRED TO GIVE NOTICE, HE SHOULD HAVE SERVED A REGISTERED AGENT.

THE COURT STATES FINAL JUDGMENT HAS NOT BEEN ENTERED YET. MR. THOMPSON STATES AS TO HIS CLIENT, IT WAS A FINAL JUDGMENT.

THE COURT COMMENTS ON APPEAL AND WHAT IT FELT THE SUPREME COURT WOULD HAVE RULED.

MR. THOMSON ARGUES THAT NO DEPOSITION WAS EVER TAKEN OF IDAHO TRADEMARK PROPERTIES, JUST JENKS BROTHERS. THAT WAS HIS BASIS FOR OBJECTING TO ATTORNEY FEES.

MR. JOHNSON ON REBUTTAL. COMMENTS ON THE PRAYER OF RELIEF BEING FOR ALL ATTORNEY FEES, COURT COSTS AND DIRECTING FREMONT COUNTY TO FORECLOSE.

THE COURT WILL TAKE ALL ISSUES UNDER ADVISEMENT AND RENDER A DECISION.

COURT CONCLUDES

**Attorney for Idaho Trademark Properties, LLC
Defendant**

DISTRICT SEVEN COURT
County of Fremont State of Idaho
Filed: _____

NOV 12 2010


ABBIE MACE, CLERK
By: _____ Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY**

Defendants.

)
) **Case No. CV-2008-469**
)
)
) **NOTICE OF APPEARANCE**
)
)
)
)
)
)
)
)
)
)

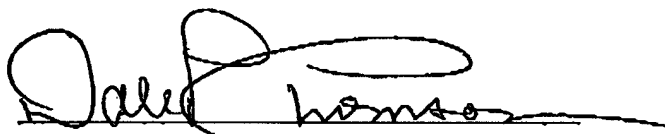
DATED This 12th day of November, 2010.


Dale P. Thomson, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **NOTICE OF APPEARANCE** was on this date served upon the person or entity named below, at the address or facsimile number set out below his name, by such service as indicated hereafter.

DATED THIS 9th day of November, 2010.


Dale P. Thomson, Esq.**PERSON SERVED**

David A. Johnson, Esq.
WRIGHT, JOHNSON, TOLSON
& WAYMENT, PLLC
477 Shoup Avenue, Suite 109
P. O. Box 52251
Idaho Falls, ID 83405-2251

Kent W. Gauchay, Esq.
Simpson & Gauchay
P. O. Box 50484
Idaho Falls, ID 83405-2251

The Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, #205
Blackfoot, ID 83221-1700

SERVICE

Hand Delivery (☐)

Facsimile Transmission (☒)
(208) 523-4400
U. S. Mail (☐)
Postage Prepaid

Hand Delivery (☐)

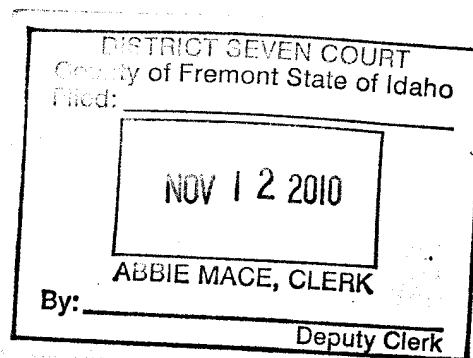
Facsimile Transmission (☒)
(208) 522-4295
U. S. Mail (☐)
Postage Prepaid

Hand Delivery (☒)

Facsimile Transmission (☐)
U. S. Mail (☐)
Postage Prepaid

Dale P. Thomson, Esq. ISB #2643
 Troy E. Rasmussen, Esq. ISB #7957
 THOMSON LAW OFFICES, CHTD.
 Attorneys at Law
 115 East Main
 P.O. Box 609
 Rexburg, Idaho 83440
 Telephone: (208) 356-9000
 Facsimile: (208) 356-9336

Attorney for Idaho Trademark Properties, LLC
 Defendant



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY**

**CHRIS and JILL MAGLEBY, dba
 SELECTIVE BUILDERS,**

Plaintiffs,

vs

**KEVIN and TANYA GARN, husband
 and wife, IDAHO TRADEMARK
 PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10**

Defendants.

)
) Case No. CV-2008-469
)
) **OBJECTION TO ATTORNEYS FEES,**
) **AND OPPOSITION TO RULE 60(b)**
)
)
)
)
)
)
)

COMES NOW, IDAHO TRADEMARK PROPERTIES, LLC, by and through its attorney,
 DALE P. THOMSON, ESQ., of Thomson Law Offices, Chtd., and does hereby object to Plaintiff's
 Motion to Set Aside Default Judgment IRCP Rule 60(b), Motion For Costs and Attorneys Fees and
 Memorandum of Costs as follows:

1. Default Judgment was entered against Idaho Trademark Properties, LLC, (hereinafter
 "ITP") on September 27, 2010. Plaintiff filed its Memorandum of Costs and requests for Attorneys

Fees and was issued attorneys fees which were incorporated into the judgment. The last date to file an appeal of the judgment, including the attorneys fees, expired on November 9, 2010.

2. The second Motion for Costs and Attorney Fees, was not timely filed pursuant to IRCP 54(d)(5). This new Motion and memorandum is merely an end run to obtain more attorney fees.

3. Furthermore, the Plaintiffs bring a new theory into the case that the action was defended frivolously. Attorney fees under I.C. 12-123 have never been plead prior to this post judgment motion of the Plaintiffs. The case is over. The basis for his new request relies on the record that he had prior to requesting the default judgment and obtaining such judgment. He was aware of the facts upon which he relies and if he wanted fees under any theory, he should have amended his complaint, obtained leave of Court, served the parties and then waited his 20 days. In any event the record does not reflect any basis on the part of ITP that was frivolous conduct. Frivolous conduct I.C. 12-123 "(i) It obviously serves merely to harass or maliciously injure another party to the civil action; (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law."

The actions of ITP and Jenks are being mingled together when in fact Jenks Brothers, Inc. and ITP are different defendants and to a large degree are at odds and adverse. The record does not indicate any frivolous conduct on the part of ITP.

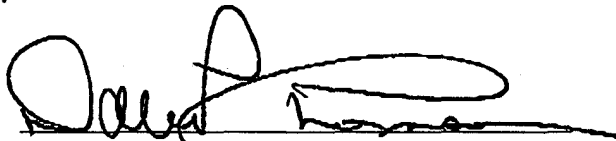
4, This Defendant further objects to the Plaintiff's Motion To Set Aside Default and Default Judgment for reason that he has not established any basis or good cause pursuant to I.R.C.P. 60(b) to set aside the judgment. He requested the judgment and if it was done in a way that he didn't like, then it was done by his own error. Certainly he had all of the facts available to him. Rule 60(b) does not allow a judgment to be set aside on doing an act wrong or negligent. Furthermore, the Plaintiff has not shown that there would be any additional causes of action raised or meritorious defense raised that would change the outcome of the case. The Plaintiff was awarded the full amount prayed for by his complaint.

3. The Plaintiff has failed to serve ITP in a legal manner and is attempting to move forward against ITP without legal notice.

4. ITP is entitled to attorneys fees and costs for having to defend this action, for reason that it is brought in an unreasonable, frivolous manner and without justification. This action is frivolous conduct as previously defined. This Defendant was required to retain counsel in order to defend this action and agreed to pay its attorney a reasonable sum. That the sum of \$1500 was agreed upon between the attorney and his client, to prepare for this case, appear in court and defend against this action. The sum of \$1500 is reasonable in light of the time involved in preparing for this hearing and appearing herein. ITP is entitled to attorneys fees pursuant to I.R.C.P. 54(d)(1), IRCP Rule 11, and I.C. §12-123.

WHEREFORE, this Defendant prays that the matter be dismissed and that Defendant be awarded attorney fees and costs as prayed for herein.

DATED This 12th day of November, 2010.

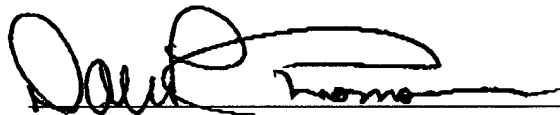


Dale P. Thomson, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **NOTICE OF APPEARANCE** was on this date served upon the person or entity named below, at the address or facsimile number set out below his name, by such service as indicated hereafter.

DATED THIS 12th day of November, 2010.



Dale P. Thomson, Esq.

PERSON SERVED

David A. Johnson, Esq.
WRIGHT, JOHNSON, TOLSON
& WAYMENT, PLLC
477 Shoup Avenue, Suite 109
P. O. Box 52251
Idaho Falls, ID 83405-2251

Kent W. Gauchay, Esq.
Simpson & Gauchay
P. O. Box 50484
Idaho Falls, ID 83405-2251

The Honorable Darren B. Simpson
c/o Bingham County Clerk
501 N. Maple, #205
Blackfoot, ID 83221-1700

SERVICE

Hand Delivery (___)

Facsimile Transmission (X)

(208) 523-4400

U. S. Mail (___)

Postage Prepaid

Hand Delivery (___)

Facsimile Transmission (X)

(208) 522-4295

U. S. Mail (___)

Postage Prepaid

Hand Delivery (X)

Facsimile Transmission (___)

U. S. Mail (___)

Postage Prepaid

December 14, 2010
AT 4:49 pm.

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS and JILL MAGLEBY, dba
SELECTIVE BUILDERS,

Plaintiffs,

vs.

KEVIN and TANYA GARN, husband and
wife; IDAHO TRADEMARK
PROPERTIES, LLC; JENKS BROTHERS,
INC.; and DOES 1-10;

Defendants.

KEVIN and TANYA GARN, husband and
wife;

Cross-Plaintiffs,

vs.

IDAHO TRADEMARK PROPERTIES,
LLC; JENKS BROTHERS, INC.; and
DOES 1-10;

Cross-Defendants.

Case No. CV-2008-469

**ORDER REGARDING
ATTORNEY FEES**

I. STATEMENT OF THE CASE

Plaintiffs Chris and Jill Magleby, doing business as Selective Builders
(hereinafter the "Maglebys"), move for an award of attorney fees against

Defendants/Cross-Plaintiffs Kevin and Tanya Garn (hereinafter the "Garns").¹ The Maglebys also filed a motion for entry of judgment, decree of foreclosure, and order of sale.²

The Garns opposed the Maglebys' Fee Motion.³ Defendant/Cross-Defendant Idaho Trademark Properties, LLC (hereinafter "ITP") also objected to the Maglebys' Fee Motion.⁴ Neither party filed an objection to the Maglebys' Motion for Entry of Judgment.

A hearing was held on the Maglebys' motions on November 12, 2010.⁵ Based upon the parties' pleadings, the record, and the relevant authorities, the Maglebys' Fee Motion shall be **granted in part and denied in part. The Magleby's Motion for Entry of Judgment shall be granted.**

II. ISSUES

The Maglebys argue that they are the prevailing party "pursuant to summary judgment and the recent proceedings."⁶ The Maglebys further contend that the "default by ITP establishes the amount of principle owed."⁷ The Maglebys maintain that ITP's defense was frivolous, and therefore the Maglebys are entitled to attorney fees pursuant to Idaho Code § 12-123.⁸

¹ Motion for Costs and Attorney Fees, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 13, 2010) (hereinafter the "**Maglebys' Fee Motion**").

² Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 15, 2010) (hereinafter the "**Maglebys' Motion for Entry of Judgment**").

³ Motion to Disallow Attorney Fees and Costs, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 26, 2010) (hereinafter the "**Garns' Motion to Disallow Fees**").

⁴ Objection to Attorneys Fees and Opposition to Rule 60(b), *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed November 12, 2010) (hereinafter "**ITP's Objection to Attorney Fees**").

⁵ Court Minutes, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed November 12, 2010).

⁶ Maglebys' Fee Motion, at p. 2, ¶ 1.

⁷ *Id.*

⁸ Maglebys' Fee Motion, at p. 2, ¶ 2.

The Garns counter that the Maglebys were not the prevailing party on all of their claims, and that the Maglebys' arguments are directed at ITP.⁹ ITP takes the position that: (1) the Maglebys already received attorney fees against ITP in the default judgment; (2) the time for seeking additional fees against ITP has passed; (3) the Maglebys raise a new theory of attorney fees not previously argued; (4) the record does not support a finding of frivolous conduct by ITP; (5) the Maglebys failed to serve ITP in a legal manner; and (6) ITP is entitled to attorney fees for having to defend against the Magleby's motions.¹⁰

Based upon these arguments, the relevant issues are as follows:

- (1) Are the Maglebys entitled to attorney fees and costs against the Garns pursuant to Idaho Code § 45-513?
- (2) If the Maglebys' are entitled to attorney fees and costs, what is the appropriate amount of fees and costs awardable?
- (3) Is the Maglebys' Fee Motion timely with regard to ITP?
- (4) Is ITP entitled to recover its costs of defending against the Maglebys' Fee Motion?

III. FINDINGS OF FACT

The following facts are found by a preponderance of the evidence.

1. The Maglebys filed this action for breach of contract against ITP and Defendant/Cross-Defendant Jenks Brothers, Inc. (hereinafter "Jenks Brothers"), unjust enrichment against ITP, Jenks Brothers and the Garns, and foreclosure of a lien they impressed upon a home, built and owned by ITP (ITP is managed by Jenks Brothers and

⁹ Garns' Motion to Disallow Fees, at pp. 1-2.

others) and sold to the Garns (the home at issue is hereinafter referred to as the "Cabin").¹¹ The Maglebys alleged that Jenks Brothers hired them to manage the construction of the Cabin and to complete the Cabin's interior decoration.¹² The Maglebys further alleged they were never paid the 1.5% of the gross sales price they were promised for their labors.¹³

2. ITP and Jenks Brothers generally denied the Maglebys' allegations and alleged numerous affirmative defenses including: the Maglebys' lack of registration with the Idaho Contractors Board (which allegedly nullifies their lien); the Maglebys' failure to provide consideration for the alleged agreement; the Statute of Frauds; unclean hands; and waiver/estoppel.¹⁴ The Garns also denied the Maglebys' allegations and filed cross-claims against ITP, Jenks Brothers and Does 1-10 for indemnification, and defective construction.¹⁵

3. Jenks Brothers and ITP sent discovery requests to the Maglebys.¹⁶

4. The Maglebys filed a motion for partial summary judgment, which was granted in part.¹⁷ The Maglebys' request for foreclosure of their materialman's lien upon the Cabin was granted, but their request for summary judgment as to the breach of

¹⁰ ITP's Objection to Attorney Fees, at pp. 1-3.

¹¹ Complaint, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed September 12, 2008) (hereinafter the "**Complaint**"), at pp. 2-5. The Cabin is located at 3635 Redtail Street, Island Park, Idaho 83429, which location is more particularly described as: Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3, Fremont County, Idaho. See: Complaint, at Exhibit A.

¹² Complaint, at p. 2.

¹³ Id.

¹⁴ Verified Answer to Plaintiffs' Complaint, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed November 4, 2008).

¹⁵ Answer and Cross-Claim, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed January 28, 2009).

¹⁶ Defendants' First Set of Interrogatories, and Production of Documents to Plaintiff [sic], *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed February 2, 2009).

¹⁷ Order Granting in Part Plaintiffs' Motion for Partial Summary Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed July 12, 2010)(hereinafter the "**Summary Judgment Order**").

contract claim against ITP and Jenks Brothers was denied.¹⁸ The Garns did not oppose the Maglebys' partial summary judgment motion.

5. Counsel for ITP and Jenks Brothers then withdrew from his representation of ITP and Jenks Brothers.¹⁹

6. A default judgment was entered against ITP and Jenks Brothers.²⁰ In addition to their award on the breach of contract action, the Maglebys received attorney fees in the amount of \$2,500.00 and costs in the amount of \$1,059.00.²¹

7. The Maglebys moved for reconsideration of the attorney fee award within the Default Judgment on the basis that ITP and Jenks Brothers had partially defended the lawsuit prior to defaulting.²² The Maglebys also moved to set aside the Default Judgment.²³ Both motions were denied.²⁴

8. The Maglebys proceeded to trial against the Garns on their unjust enrichment claim.²⁵ At trial, the Garns' oral motion to dismiss was granted.²⁶

9. In their Fee Motion, the Maglebys requested attorney fees and costs under Idaho Code § 45-513 as against the Garns and Idaho Code § 12-123 as against ITP and Jenks Brothers.²⁷

¹⁸ *Id.*, at p. 10.

¹⁹ See: Order to Withdraw as Attorney of Record, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed August 20, 2010).

²⁰ Default Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed September 27, 2010) (hereinafter the "**Default Judgment**").

²¹ Default Judgment, at p. 2.

²² Motion to Alter, Amend or Reconsider, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed September 29, 2010) (hereinafter the "**Maglebys' Motion to Reconsider**").

²³ Motion to Set Aside Default and Default Judgment, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 5, 2010) (hereinafter the "**Maglebys' Motion to Set Aside Default**").

²⁴ Minute Entry, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 21 2010) (denying the Maglebys' Motion to Reconsider); Minute Entry – Court Trial, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 27, 2010) (hereinafter the "**Court Trial Minute Entry**"), at p. 2 (denying the Maglebys' Motion to Set Aside Default).

²⁵ Court Trial Minute Entry.

IV. PRINCIPLES OF LAW

1. Idaho Code § 45-513 reads in pertinent part:

The court shall allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees.

2. Upon the successful entry of a judgment of foreclosure of a lien claimed under Idaho Code § 45-507, an award of attorney fees and costs is mandatory.²⁸ The *amount* of the award, however, is still a matter of discretion for this Court.²⁹

3. A discretionary decision is examined under a three part test: 1) whether the issue was correctly perceived as one of discretion, 2) whether the court's action fell within the outer boundaries of its discretion and was consistent with the legal standards applicable to the consideration of an award, and 3) whether the court's decision was reached by an exercise of reason.³⁰

4. The statutory right to attorney fees under Idaho Code § 45-513 upon lien foreclosure applies even where the defendant property owner has been successful on a counterclaim, so long as the counterclaim did not totally offset the amount of the lien.³¹

5. Idaho Rule of Civil Procedure 54(e)(1) provides that attorney fees may be awarded to the prevailing party in a civil lawsuit, if attorney fees are allowed by statute or contract.

6. To the extent Idaho Rule of Civil Procedure 54(e) is inconsistent with Idaho Code § 45-513, Rule 54(e) does not modify the statute.³²

²⁶ Court Trial Minute Entry, at p. 3.

²⁷ Maglebys' Fee Motion, at pp. 1-2.

²⁸ *Fairfax v. Ramirez*, 133 Idaho 72, 78, 982 P.2d 375, 381 (Ct. App. 1999).

²⁹ *Id.* [citing: *Olsen v. Rowe*, 125 Idaho 686, 689, 873 P.2d 1340, 1343 (Ct. App. 1994)] (emphasis in original).

³⁰ *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

³¹ *Olsen v. Rowe*, 125 Idaho at 688, 873 P.2d at 1342.

7. Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs.³³

8. A memorandum of costs may not be filed later than fourteen (14) days after entry of judgment.³⁴ Failure to file such memorandum of costs within the period prescribed by Idaho Rule of Civil Procedure 54(d)(5) shall be a waiver of the right of costs.³⁵

9. The factors considered in determining an award of attorney fees, as set forth in Idaho Rule of Civil Procedure 54(e)(3), include:

- (a) the time and labor required;
- (b) the novelty and difficulty of the questions;
- (c) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;
- (d) the prevailing charges for like work;
- (e) whether the fee is fixed or contingent;
- (f) the time limitations imposed by the client or the circumstances of the case;
- (g) the amount involved and the results obtained;
- (h) the undesirability of the case;
- (i) the nature and length of the professional relationship with the client;
- (j) awards in similar cases;

³² *Olson v. Rowe*, 125 Idaho at 689, 873 P.2d at 1343.

³³ Idaho Rule of Civil Procedure 54(e)(5).

³⁴ Idaho Rule of Civil Procedure 54(d)(5).

³⁵ Idaho Rule of Civil Procedure 54(d)(5).

(k) the reasonable cost of automated legal research, if the court finds it was reasonably necessary in preparing a party's case; and

(l) any other factor which the court deems appropriate in the particular case.³⁶

10. Idaho Rule of Civil Procedure 54(d)(1)(C) sets out those costs which the prevailing party may recover as a matter of right.

11. Idaho Rule of Civil Procedure 54(d)(1)(D) provides that additional cost items, not enumerated in subsection (d)(1)(C), may be awarded at this Court's discretion upon a showing that such costs were necessary and exceptional, and reasonably incurred.³⁷ The Idaho Supreme Court defines "exceptional" under Idaho Rule of Civil Procedure 54(d)(1)(D) as those costs incurred because the nature of the case itself is exceptional.³⁸

12. A party is not entitled to recover attorney fees, pursuant to Idaho Code § 12-121, on a default judgment.³⁹

V. ANALYSIS

A. Costs and Fees as Against the Garns.

The Maglebys are entitled to a judgment of foreclosure of their lien as against the Garns.⁴⁰ As such, the Maglebys are entitled to recover reasonable fees and costs from the Garns.

In determining the appropriate amount of attorney fees to award the Maglebys, the award should represent only that approximate amount of time attributable to the

³⁶ Idaho Rule of Civil Procedure 54(e)(3).

³⁷ Idaho Rule of Civil Procedure 54(d)(1)(D).

³⁸ *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

³⁹ Idaho Rule of Civil Procedure 54(e)(1).

⁴⁰ Summary Judgment Order, at p. 10.

Maglebys' claims against the Garns. (The Maglebys received attorney fees against ITP and Jenks Brothers within the Default Judgment.) Furthermore, the Maglebys did not depose either of the Garns. The foreclosure issue, uncontested by the Garns, was determined in the Summary Judgment Order and involved little novelty or difficulty. The skill requisite to perform the legal services necessary to pursue the Maglebys' claims against the Garns was not moderate only, and required no specialized training or study beyond the research typical of any legal issue. The \$200.00 hourly fee charged by David Johnson, the Maglebys' attorney, is typical for hourly fees charged by attorneys of similar experience and skill as Mr. Johnson's. Nothing in the record shows that Mr. Johnson charged the Maglebys a fixed fee. Mr. Johnson obtained foreclosure of the Maglebys' materialman's lien from the Garns. The Maglebys had no contract claim against the Garns, and their unjust enrichment claim was dismissed mid-trial for lack of expert testimony on the valuation of the Maglebys' services. The case did not appear to be undesirable. Nothing in the record indicated the nature or length of Mr. Johnson's professional relationship with the client, awards in similar cases, or costs of automated research.

For purposes of expediency, a copy of Mr. Johnson's attorney hours is attached hereto as Exhibit A. Each time/labor entry is marked with the letter F, H, TT, OT, Q, D or C. Those letters indicate the following disposition of each entry:

F = full amount of claimed time awarded.

H = one-half of claimed time awarded.

TT = two-thirds of claimed time awarded.

OT = one-third of claimed time awarded.

Q = one-quarter of claimed time awarded.

D = full amount of claimed time disallowed.

C = item claimed is adjudicated under cost analysis.

Based upon the attorney fees allowed, in whole or in part, the Maglebys are entitled to recover 1,638 minutes of attorney time (or 27 hours and 18 minutes) from the Garns. This time award, multiplied by Mr. Johnson's hourly rate of \$200.00 per hour equals an attorney fee award of **\$5,460.00**.

The Maglebys are also entitled to recover their costs pursuant to Idaho Code § 45-513. Those costs must be appropriate pursuant to Rule 54(d). Based upon the Affidavit of David A. Johnson,⁴¹ the Maglebys shall recover the following costs as a matter of right in the amount of **\$88.00** for the Court filing fee.⁴² The Maglebys shall not recover costs incurred in serving ITP and Jenks Brothers.

The Maglebys also requested a total of \$916.00 for miscellaneous costs/discretionary costs.⁴³ In order to merit an award of discretionary costs, such costs must be necessary, exceptional, and reasonably incurred. Exceptional costs are those costs incurred because the nature of the case itself is exceptional.

This case cannot be classified as exceptional. It was straightforward and simple. Therefore, discretionary costs are not appropriate.

⁴¹ Affidavit of David A. Johnson (Second) Calculating Interest and in Support of Attorney Fees and Costs, *Magleby v. Garn*, Fremont County case no. CV-2008-469 (filed October 13, 2010) (hereinafter the "**Johnson Affidavit**").

⁴² Idaho Rule of Civil Procedure 54(d)(1)(C)(1); Johnson Affidavit, at p. 3.

⁴³ Johnson Affidavit, at p. 3.

B. Fees Against ITP.

The Maglebys request for fees under Idaho Code § 12-121 against ITP is untimely. Judgment was entered against ITP on September 27, 2010. The Maglebys did not file their request for Idaho Code § 12-121 attorney fees until October 13, 2010, more than fourteen (14) days after the entry of the Default Judgment against ITP.

However, a final judgment must necessarily be filed in this case. The Maglebys' request for attorney fees could be considered prematurely (and therefore timely) filed with respect to that final judgment. However, Idaho Rule of Civil Procedure 54(e)(1) states that attorney fees shall not be awarded pursuant to Idaho Code § 12-121 on a default judgment. Therefore, the Maglebys are not entitled to recover attorney fees from ITP pursuant to Idaho Code § 12-121.

For these reasons, the Maglebys' request for attorney fees against ITP under Idaho Code § 12-121 shall be denied.

C. Attorney Fee for ITP's Defense of Maglebys' Fee Motion.

Finally, ITP requests \$1,500.00 in attorney fees for defending the Maglebys' Fee Motion. The Magleby's fee request against ITP, given the plain language of Idaho Rule of Civil Procedure 54(e)(1) was frivolous. As such, ITP shall recover \$1,500.00 from the Maglebys for its costs to defend against the Maglebys' Fee Motion.

VI. CONCLUSIONS OF LAW

(1) The Maglebys are entitled to attorney fees and costs against the Garns pursuant to Idaho Code § 45-513.

(2) The Maglebys' are entitled to attorney fees in the amount of \$5,460.00 and costs in the amount of \$88.00 as against the Garns.

(3) The Maglebys' Fee Motion is not timely with regard to ITP.

(4) ITP is entitled to recover its costs, in the amount of \$1,500.00, of defending against the Maglebys' Fee Motion.

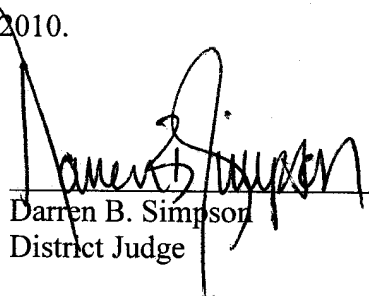
VII. ORDER

The Maglebys' Fee Motion is **granted in part**. The Maglebys shall have and recover from the Garns attorney fees in the amount of \$5,460.00 and costs in the amount of \$88.00. The Maglebys shall not recover attorney fees, pursuant to Idaho Code § 12-121, from ITP. ITP shall recover its costs of defending against the Maglebys' Fee Motion in the amount of \$1,500.00.

A final judgment, including a decree of foreclosure and order of sale, shall issue separately.

IT IS SO ORDERED.

DATED this 14th day of December 2010.


Darren B. Simpson
District Judge

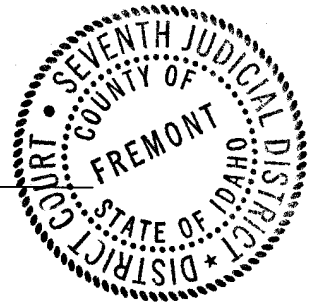


Exhibit 4

Plaintiffs' Attorney Hours

Magleby v. Idaho Trademark Properties, LLC et. Al
Fremont County Case CV-08-469

	Date	Time	Description
F	3/7/2008	2:30:00	Preparation of Document: Claim of Lien
D	4/18/2008	0:42:00	Evaluation of Credit Reporting Issues Telephone call to client concerning case Letter to Jenk Brothers, Inc.
H	8/21/2008	0:30:00	Office Conference with client
F	9/8/2008	2:42:00	Office Conference with client Preparation of Document: Complaint
C	9/9/2008		Filing Fee
D	10/31/2008	0:12:00	Review of Notice of Appearance from Jenks Attorney, Telephone call to client concerning case
H	11/4/2008	0:36:00	Review of Jenks Brothers Answers
		0:45:00	Review of filings, Telephone conference with client, Correspondence (via email) to Opposing Attorneys Garn and Ehardt
Q	11/12/2008	2:00:00	Review correspondence from client. Correspondence (via email) to Opposing Attorney Garn Preparation of Document: Notice of Intent to Take Default Correspondence (via email) to Opposing Attorney Ehardt Preparation of Document: Interrogatories and Request for Production of Documents
OT	11/14/2008	0:24:00	Review of Idaho Trademark Properties' answer email to client and atty Garn
F	12/19/2008	0:24:00	Telephone conference with Kent Gauchay email to clients
D	1/19/2009	0:30:00	Review of file Place telephone call to client
H	1/29/2009	1:30:00	Review documents received from opposing party including Anser and Cross Claim. Preparation of Document: Interrogatories and Request for Production of documents
D	2/3/2009	0:30:00	Review of Discovery Requested from opposing side, forward to client with instructions
D	2/4/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Production of Documents
H	2/10/2009	1:30:00	Review of client Office Conference with clients to discuss case, discovery and gathering of facts.
D	2/27/2009	2:12:00	Preparation of Document: Answer to Interrogatories and Responses to Request for Production
D	3/6/2009	0:30:00	Prepare modifications to Answers to Interrogatories and Responses to Request for Production.
F	3/7/2009	0:18:00	Letter to opposing attorney regarding rule 37 compliance
F	3/31/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for

1 - Exhibit 4, Plaintiff's Attorney Hours

EXHIBIT A

			Production from Garns
D	5/13/2009		Title Search
H	5/14/2009	0:30:00	Office Conference with client to discuss case
H	7/6/2009	0:12:00	Conference with client regardless various issues
Q	11/2/2009	1:40:00	Conference with client Letters to opposing attorneys to request dates for depositions and for IRCP 37 compliance for requiring supplemental answers to interrogatories and responses to request for discovery
H	11/30/2009	0:18:00	Review of file, Telephone call to client concerning case status
D	12/3/2009	0:30:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client Place telephone call to
H	12/14/2009	4:12:00	Conference with client Telephone conference with opposing attorney Garner Brief research Preparation of Document: Motion for Summary Judgment Preparation of Document: Affidavit of Chris Magelby Preparation of Document: Affidavit of Jill Magelby
H	12/16/2009	1:00:00	Prepare modifications to documents
H	1/12/2010	0:48:00	Prepare modifications to Summary Judgment documents, Set up hearing, Preparation of Document: Notice of Hearing
H	1/13/2010	0:30:00	Edit and modification of documents: Motion for Summary Judgment and Affidavits of Jill and Chris Magelby
D	2/1/2010	0:48:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client
D	2/8/2010	0:30:00	Review of Jenks response to Summary Judgment and Affidavits of Tony Jenks and Bradon Jenks
H	2/9/2010	0:18:00	Conference with client
TT	2/16/2010	1:30:00	Review of file Place telephone call to Attorney Gauchay Place telephone call to Research - Sufficiency of Affidavits Review, Research issues raised by Jens Brothers Preparation of pleadings:
H	2/17/2010	0:24:00	Brief research on issue of insufficiency of lien based upon incorrect amount of claim Telephone call to client concerning case
Q	2/23/2010	2:48:00	Preparation for Hearing Travel to St. Anthony (Split client) Court Appearance: Summary Judgment Hearing
D	2/26/2010	0:48:00	Telephone conference with client Letter to opposing attorney
D	3/8/2010	1:42:00	Prepare Subpoena for Jenks Brother Inc. Preparation of Document: Magleby's Second Set of Interrogatories and Request for Production of Documents
F	3/19/2010	0:36:00	Conference with Opposing Attorney Garn Telephone conference with client Prepare modifications to Notice of Depositions
H	3/29/2010	0:18:00	Review correspondence from client and Correspondence to Client via email
D	3/31/2010	3:36:00	Preparation for depositions Telephone conference with Fremont County Building Department Telephone conference with clients Review of Building Department Records

D	4/1/2010	1:12:00	Conference with client regarding deposition Final preparation
D	4/2/2010	3:48:00	Conference with clients Deposition of Brand Jenks Deposition of Tony Jenks
D	4/5/2010	0:30:00	Conference with Josh Gardner
D	4/6/2010	0:30:00	Preparation of pleadings: Note of Issue and Request for Trial Setting
D	4/15/2010		Deposition Costs for Tony and Brandon Jenks
D	4/21/2010	1:12:00	Preparation of Publication of Deposition of Tony Jenks, Start work on Publication of Deposition of Brandon Jenks
D	4/22/2010	2:30:00	Review of Deposition of Brandon Jenks, Preparation of Document: Partial Publication of Transcript of Dep. of Brandon Jenks Review of Summary Judgment Documents
H	5/18/2010	3:00:00	Preparation for Summary Judgment hearing
H	5/19/2010	1:30:00	Preparation for hearing
Q	5/21/2010	4:24:00	Preparation for Oral Arguments Travel to and from St. Anthony Court Appearance: Motion for Summary Judgment
F	6/28/2010	0:30:00	Court Appearance - Status Conference
Q	7/13/2010	0:48:00	Review of Summary Judgment Decision Telephone conference with client
D	8/4/2010	0:36:00	Review documents received from opposing party including Motion to Withdraw Preparation of Document: Notice of Intent to Appear Telephonically
D	8/13/2010	0:30:00	Letter to opposing attorney to comply with IRCP 37
D	8/18/2010	1:18:00	Preparation of pleadings: Motion to Compel and Affidavit
D	8/26/2010	1:00:00	Review Correspondence from opposing attorney Letter to opposing attorney with research of case
D	8/27/2010	1:00:00	Work on Settlement Letter
D	8/31/2010	2:36:00	Conference with client Brief Trial Preparation Preparation of Document: Witness and Exhibit List
D	9/1/2010	0:30:00	Edit and modification of document: Plaintiff's Witness and Exhibit List
D	9/2/2010	0:24:00	Review of documents from client, Telephone call to client concerning
D	9/3/2010	1:36:00	Prepare Hours of Work for Magleby's. Trial Preparation Prepare modifications to Plaintiff's Witness and Exhibit List
D	9/10/2010	3:00:00	Preparation of Default Documents, Calculation of Attorney Fees and Costs, and Interest
F	9/17/2010	0:18:00	Review of file and evaluate status of action against Garns Telephone Conference with Counsel for Opposing Party regarding case
TT	9/23/2010:	1:18:00	Research issue on whether or not owner has independent standing to challenge contractual finding Review of case file for establishment of judgment and foreclosure against all defendants
TT	9/27/2010	1:12:00	Preparation for Telephone conference Telephone conference with Court and opposing attorney Research

D	9/28/2010	3:06:00	Preparation of pleadings: Motion to Alter, Amend or Reconsideration
D	9/29/2010	1:00:00	Edit and modification of Motion to Alter, Amend or Reconsider
OT	10/1/2010	1:30:00	Follow up with Motion for Reconsideration
			Telephone conference with Judge's law clerk and Kent Gauchay
D	10/4/2010	8:00:00	Telephone conference with Court and opposing attorney to argue Motion to Alter, Amend, or Reconsider. Telephone conference with opposing attorney. Trial Preparation
OT	10/5/2010	5:00:00	Travel to and from St. Anthony
			Court Appearance: Trial
OT	10/7/2010	1:30:00	Research issues related to equitable relief when express contract exists
			Research issues related to attorney fees in foreclosure and 12-123.
			Conference with Dale Thomson, attorney for Fergusons
H	10/8/2010	3:30:00	Preparation of pleadings: Motion for Attorney Fees and Costs
			Preparation of Document: Memorandum in Support of Attorney Fees and Costs
			Telephone conference with Opposing Attorney
			Telephone conference with client
	TOTAL	100.92	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order Regarding Attorney Fees was mailed by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 15 day of December 2010, to:

David A. Johnson, Esq.
Wright, Johnson, Tolson &
Wayment, PLLC
477 Shoup Ave., Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251



U.S. Mail



Courthouse Box



Facsimile

Kent W. Gauchay, Esq.
SIMPSON & GAUCHAY
Attorneys at Law
497 North Capital Ave., Suite 200
P.O. Box 50484
Idaho Falls, ID 83405-0484



U.S. Mail




Courthouse Box



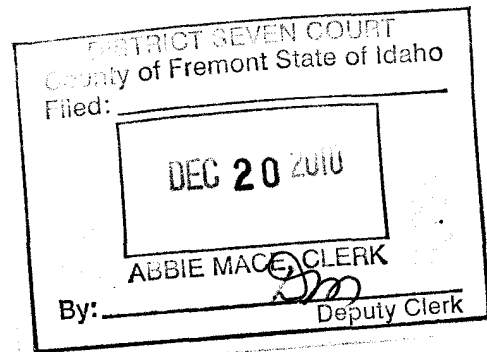
Facsimile

ABBIE MACE, Clerk of the Court

By:


for Deputy Clerk

David A. Johnson, Esq.
Wright Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**AFFIDAVIT CALCULATING
INTEREST AGAINST KEVIN AND
TANYA GARN**

STATE OF IDAHO)
 :ss.
County of Bonneville)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.

1-AFFIDAVIT CALCULATING INTEREST AGAINST KEVIN AND TANYA GARN


3. The amount currently due Plaintiffs from Defendants Kevin and Tanya Garn are itemized as follows:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,826.67
Attorney's Fees	\$	5,460.00
Court Costs/Sheriff's Fees	\$	88.00
Total Judgment	\$	36,624.67
Less Amount Collected	\$	0.00
FINAL JUDGMENT	\$	36,624.67

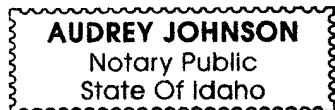
4. Interest in the sum of \$7,967.93 is owing as of December 22, 2010:


Date	Principal Balance	Per Annum Interest Rate	Number of Years	Accumulated Interest
January 1, 2008 to September 13, 2010	\$23,250.00	12.00%	2.70	\$7,533.00
September 27, 2010 to December 22, 2010	\$23,250.00	5.375%	.235	\$293.67
			Total	\$7,826.67

DATED: December 20, 2010


David A. Johnson

SUBSCRIBED AND SWORN to before me on December 20, 2010




Notary Public for Idaho
Commission expires: 3-10-15

2-AFFIDAVIT CALCULATING INTEREST AGAINST KEVIN AND TANYA GARN

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on December 20, 2010, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Method of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484


Facsimile: 522-4295

Dale P. Thomson
Thompson Law
PO Box 609
Rexburg, ID 83440

Facsimile: 356-9336

Honorable Darren B. Simpson
Bingham County Courthouse
501 N. Maple, #310
Blackfoot, ID 83221-1700

Facsimile: 785-8057



David A. Johnson, Esq.

Exhibit A

Plaintiffs' Attorney Hours

Magleby v. Idaho Trademark Properties, LLC et. Al Fremont County Case CV-08-469

Date	Time	Description
3/7/2008	2:30:00	Preparation of Document: Claim of Lien
4/18/2008	0:42:00	Evaluation of Credit Reporting Issues Telephone call to client concerning case Letter to Jenk Brothers, Inc.
8/21/2008	0:30:00	Office Conference with client
9/8/2008	2:42:00	Office Conference with client Preparation of Document: Complaint
9/9/2008		Filing Fee
10/31/2008	0:12:00	Review of Notice of Appearance from Jenks Attorney, Telephone call to client concerning case
11/4/2008	0:36:00	Review of Jenks Brothers Answers
	0:45:00	Review of filings, Telephone conference with client, Correspondence (via email) to Opposing Attorneys Garn and Ehardt
11/12/2008	2:00:00	Review correspondence from client. Correspondence (via email) to Opposing Attorney Garn Preparation of Document: Notice of Intent to Take Default Correspondence (via email) to Opposing Attorney Ehardt Preparation of Document: Interrogatories and Request for Production of Documents
11/14/2008	0:24:00	Review of Idaho Trademark Properties' answer email to client and atty Garn
12/19/2008	0:24:00	Telephone conference with Kent Gauchay email to clients
1/19/2009	0:30:00	Review of file Place telephone call to client
1/29/2009	1:30:00	Review documents received from opposing party including Anser and Cross Claim. Preparation of Document: Interrogatories and Request for Production of documents
2/3/2009	0:30:00	Review of Discovery Requested from opposing side, forward to client with instructions
2/4/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Producton of Documents
2/10/2009	1:30:00	Review of client Office Conference with clients to discuss case, discovery and gathering of facts.
2/27/2009	2:12:00	Preparation of Document: Answer to Interrogatories and Responses to Request for Production
3/6/2009	0:30:00	Prepare modifications to Answers to Interrogatories and Responses to Request for Production.
3/7/2009	0:18:00	Letter to opposing attorney regarding rule 37 compliance
3/31/2009	0:42:00	Review of Answers to Interrogatories and Responses to Request for Production from Garns

4-AFFIDAVIT CALCULATING INTEREST AGAINST KEVIN AND TANYA GARN

5/13/2009		Title Search
5/14/2009	0:30:00	Office Conference with client to discuss case
7/6/2009	0:12:00	Conference with client regardless various issues
11/2/2009	1:40:00	Conference with client Letters to opposing attorneys to request dates for depositions and for IRCP 37 compliance for requiring supplemental answers to interrogatories and responses to request for discovery
11/30/2009	0:18:00	Review of file, Telephone call to client concerning case status
12/3/2009	0:30:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client Place telephone call to
12/14/2009	4:12:00	Conference with client Telephone conference with opposing attorney Garner Brief research Preparation of Document: Motion for Summary Judgment Preparation of Document: Affidavit of Chris Magelby Preparation of Document: Affidavit of Jill Magelby
12/16/2009	1:00:00	Prepare modifications to documents
1/12/2010	0:48:00	Prepare modifications to Summary Judgment documents, Set up hearing, Preparation of Document: Notice of Hearing
1/13/2010	0:30:00	Edit and modification of documents: Motion for Summary Judgment and Affidavits of Jill and Chris Magelby
2/1/2010	0:48:00	Telephone Conference with Counsel for Opposing Party regarding possible settlement Telephone conference with client
2/8/2010	0:30:00	Review of Jenks response to Summary Judgment and Affidavits of Tony Jenks and Bradon Jenks
2/9/2010	0:18:00	Conference with client
2/16/2010	1:30:00	Review of file Place telephone call to Attorney Gauchay Place telephone call to Research - Sufficiency of Affidavits Review, Research issues raised by Jens Brothers Preparation of pleadings:
2/17/2010	0:24:00	Brief research on issue of insufficiency of lien based upon incorrect amount of claim Telephone call to client concerning case
2/23/2010	2:48:00	Preparation for Hearing Travel to St. Anthony (Split client) Court Appearance: Summary Judgment Hearing
2/26/2010	0:48:00	Telephone conference with client Letter to opposing attorney
3/8/2010	1:42:00	Prepare Subpoena for Jenks Brother Inc. Preparation of Document: Magleby's Second Set of Interrogatories and Request for Production of Documents
3/19/2010	0:36:00	Conference with Opposing Attorney Garn Telephone conference with client Prepare modifications to Notice of Depositions
3/29/2010	0:18:00	Review correspondence from client and Correspondence to Client via email
3/31/2010	3:36:00	Preparation for depositions Telephone conference with Fremont County Building Department Telephone conference with clients Review of Building Department Records
4/1/2010	1:12:00	Conference with client regarding deposition Final preparation
4/2/2010	3:48:00	Conference with clients Deposition of Brand Jenks Deposition of Tony Jenks

5-AFFIDAVIT CALCULATING INTEREST AGAINST KEVIN AND TANYA GARN

4/5/2010	0:30:00	Conference with Josh Gardner
4/6/2010	0:30:00	Preparation of pleadings: Note of Issue and Request for Trial Setting
4/15/2010		Deposition Costs for Tony and Brandon Jenks
4/21/2010	1:12:00	Preparation of Publication of Deposition of Tony Jenks, Start work on Publication of Deposition of Brandon Jenks
4/22/2010	2:30:00	Review of Deposition of Brandon Jenks, Preparation of Document: Partial Publication of Transcript of Dep. of Brandon Jenks Review of Summary Judgment Documents
5/18/2010	3:00:00	Preparation for Summary Judgment hearing
5/19/2010	1:30:00	Preparation for hearing
5/21/2010	4:24:00	Preparation for Oral Arguments Travel to and from St. Anthony Court Appearance: Motion for Summary Judgment
6/28/2010	0:30:00	Court Appearance - Status Conference
7/13/2010	0:48:00	Review of Summary Judgment Decision Telephone conference with client
8/4/2010	0:36:00	Review documents received from opposing party including Motion to Withdraw Preparation of Document: Notice of Intent to Appear Telephonically
8/13/2010	0:30:00	Letter to opposing attorney to comply with IRCP 37
8/18/2010	1:18:00	Preparation of pleadings: Motion to Compel and Affidavit
8/26/2010	1:00:00	Review Correspondence from opposing attorney Letter to opposing attorney with research of case
8/27/2010	1:00:00	Work on Settlement Letter
8/31/2010	2:36:00	Conference with client Brief Trial Preparation Preparation of Document: Witness and Exhibit List
9/1/2010	0:30:00	Edit and modification of document: Plaintiff's Witness and Exhibit List
9/2/2010	0:24:00	Review of documents from client, Telephone call to client concerning
9/3/2010	1:36:00	Prepare Hours of Work for Maglebys. Trial Preparation Prepare modifications to Plaintiff's Witness and Exhibit List
9/10/2010	3	Preparation of Default Documents, Calculation of Attorney Fees and Costs, and Interest
TOTAL	74.52	

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS

Plaintiffs,

VS.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No: CV-08-469

ORIGINAL

WRIT OF EXECUTION

Microfilm No. **532553**
At 27 Day Jan 2011
At 1:52 O'Clock P M
ABBIE MACE
FREMONT CO RECORDER
Fee \$10 Corral Deputy
Recorded at Request of Fremont County Sheriff

TO: SHERIFF OF FREMONT COUNTY

WHEREAS, ON December 21, 2010, Plaintiffs received a Judgment, Decree of Foreclosure and Order of Sale in the District Court, in Fremont County, Idaho, against Defendants Kevin and Tanya Garn for \$36,624.67.

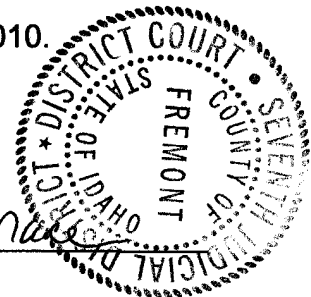
AND WHEREAS, the judgment roll in the action in which said order was entered is filed in the Clerk's office of said Court in Bonneville County, and said Judgment was docketed in said Clerk's office in said County, on the day and year first-above written. And, at the date of this Writ \$36,624.67 is now actually due on said Judgment.

NOW THEREFORE, YOU, the Sheriff, are hereby required to make the sums due on said Judgment to satisfy said Judgment in full against the real property located at 3635 Redtail Street, Island Park, Idaho (Subject Property), more particularly described as: Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3, Fremont County, Idaho, and make return of this Writ within sixty (60) days after your receipt hereof, with what you have done endorsed thereon.

ATTEST my hand and seal of said Court this 21 day of December, 2010.

ABBIE MACE, CLERK

Heborah Mace
Deputy Clerk



Filed on return _____, 2011.

1-WRIT OF EXECUTION

DOCUMENT
SCANNED

Microfilm No. **532554**
At 27 Day Jan 2011
At 1:57 O'Clock P M
ABBIE MACE
FREMONT CO RECORDER
Fee \$ 13 Recorded at Request of Fremont County Sheriff

David A. Johnson, Esq.
Wright Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

NOTICE OF LEVY

NOTICE IS HEREBY GIVEN under and by virtue of a Judgment, Decree of Foreclosure and Order of Sale dated January 11, 2011 by the above-entitled court in the aforementioned action, I have this day attached and levied upon all the right, title, claim and interest of the Defendants, Kevin and Tanya Garn, Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Does 1-10, in and to the following described property located within Fremont County, State of Idaho, described as follows:

1- NOTICE OF LEVY

Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3,
Fremont County, Idaho.

Located at 3635 Redtail Street, Island Park, Idaho.

Said property will be sold as one lot, without warranty or guaranty of title, and be subject to any and all rights of redemption as provided by law. Said property will be sold at public auction to the highest bidder, for cash, lawful money of the United States of America.

The sheriff, by Certificate of Sale, will transfer the right, title and interest, of the judgment debtor in and to the property at the time the execution was levied. The sheriff will give possession but does not guarantee clear title nor continuous possessory right to the purchaser. The sheriff sells all property as is, and without any guarantee or warranty whatsoever.

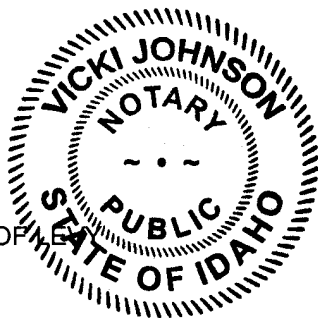
DATED this 27 day of January, 2011.


Len Humphries
Sheriff of Fremont County

By: _____
Deputy

STATE OF IDAHO)
) ss.
County of Teton)

On January 27, 2011, before me, the undersigned Notary Public in and for the State of Idaho, personally appeared Len Humphries, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that (s)he executed the same on behalf of the Fremont County Sheriff.




Notary Public for State of Idaho
My Commission Expires: 11-07-13

2- NOTICE OF

NOTICE OF SHERIFF'S SALE (Real Property)

Fremont County Case CV-08-469

By virtue of a Writ of Execution and a Judgment, Decree of Foreclosure and Order of Sale dated January 11, 2011, issued out of the District Court of the 7th Judicial District, State of Idaho, in and for Fremont County, in the lawsuit of Plaintiffs, Chris and Jill Magleby d/b/a Selective Builders versus Defendants Kevin and Tayna Garn, Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Does 1-10, CV-08-469 duly attested on January 11, 2011, I have levied upon all the right, title, and interest of the Defendants Kevin and Tayna Garn, Idaho Trademark Properties, LLC, Jenks Brothers, Inc., and Does 1-10 in and to the real property described below, situated in Fremont County, Idaho towards the satisfaction of the Judgment, Decree of Foreclosure and Order of Sale described above. Notice is given that Plaintiffs have a lien on the lot described below pursuant to Idaho Code §45-501 et seq (Mechanic and Materialmen's Lien, which lien was recorded on the records of Fremont County, State of Idaho, on March 10, 2008, as Instrument No. 515729.

NOTICE IS HEREBY GIVEN that on March 3, 2011, at the hour of 10:00 a.m. in the foyer of the Fremont County Courthouse located at 151 W. 1st N., St. Anthony, Idaho, I will attend, offer, and sell at public auction to the highest bidder, for cash, lawful money of the United States of America, all of the right, title and interest of the above-named Defendants, in and to the following real property:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3,
Fremont County, Idaho.

Located at 3635 Redtail Street, Island Park, Idaho.


Said property will be sold as one parcel without warranty or guaranty of title, and be subject to any and all rights of redemption as provided by law.

The sheriff, by Certificate of Sale, will transfer the right, title and interest, of the judgment debtor in and to the property at the time the execution was levied. The sheriff will give possession but does not guarantee clear title nor continuous possessory right to the purchaser. The sheriff sells all property as is, and without any guarantee or warranty whatsoever.

In accordance with Idaho Code § 60-113, information concerning the location of the property may be obtained from the following person: David A. Johnson, Esq., Wright, Johnson & Wayment, PLLC, 477 Shoup Ave., Suite 109, P.O. Box 52251, Idaho Falls, Idaho 83405-2251, telephone 208-535-1000.

DATED this 21 day of January, 2011.

Len Humphries
Sheriff of Fremont County

By: 
Deputy

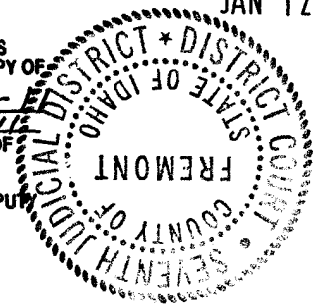
FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHOJanuary 11, 2011AT 11:19 a.m.Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

RECEIVED

JAN 12 2011

David A. Johnson, Esq.
Wright Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

THE DOCUMENT TO WHICH THIS CERTIFICATE IS
ATTACHED IS A FULL, TRUE AND CORRECT COPY OF
THE ORIGINAL ON FILE AND OF RECORD IN MY
OFFICE, SAME HAVING BEEN FILED 1-11-2011
ATTEST January 11, 2011
ABBIE MACE CLERK OF THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT IN AND FOR
FREMONT COUNTY, IDAHO.
BY Abbie Mace DEPUTY



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**JUDGMENT, DECREE OF
FORECLOSURE AND ORDER OF
SALE**

~~On December 1, 2010~~ On January 11, 2011, the above entitled matter came before the Court on the
Plaintiff's Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale. After
consideration, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- The Court Decrees that Plaintiffs have a Mechanics and Materialmen's
Lien pursuant to Idaho Code §45-501 et. Seq. against the real property

1- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

Microfilm No. **532416**
Jan Day Jan 20 11
At 11:05 O'Clock am
ABBIE MACE
FREMONT CO RECORDER
Fee \$ 11.00 Deputy
Recorded at Request of David A. Johnson
P.A.

532416

located at 3635 Redtail Street, Island Park, Idaho (Subject Property),
more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1,
Division 3, Fremont County, Idaho.

2. Judgment is hereby entered in favor of Plaintiffs in the sum of \$36,624.67
lawful money of the United States, with interest thereon at the lawful rate
of interest from date hereof until paid for which Execution may issue
against the property described in the preceding paragraph. This
judgment is based upon the following calculations:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,826.67
Attorney Fees	\$	5,460.00
Court Costs	\$	88.00
Total Judgment	\$	36,624.67
Less Sum Previously Paid	\$	0.00
Final Judgment	\$	36,624.67

3. Plaintiffs are entitled to foreclose their lien by Sheriff's sale. The Sheriff of
Fremont County, Idaho is ordered to sell the property described in
paragraph 1 and apply the proceeds of the sale to the payment of the
costs of the court and the expenses of the sale, and the amount due to
the Plaintiffs.

DATED: ^{JANUARY} ~~December~~ 11, 2010


Darren B. Simpson, District Judge

2- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

532416

NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled Court, and that I mailed a true copy of the foregoing document(s) on ~~December~~ ^{January} 11, 2010, to the following attorney(s) of record and/or parties:

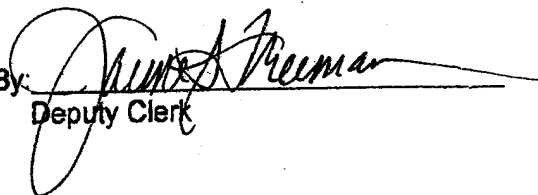
Name and Address

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Dale P. Thomson
Thomson Law
PO Box 609
Rexburg, ID 83440

David A. Johnson
Wright Johnson & Wayment, PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

Clerk of the Court

By: 
Deputy Clerk

3- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

January 11, 2011
AT *11:19 a.m.*

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

David A. Johnson, Esq.
Wright Johnson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**JUDGMENT, DECREE OF
FORECLOSURE AND ORDER OF
SALE**

~~On December 1, 2010~~ On ~~December 1, 2010~~ January 11, 2011, the above entitled matter came before the Court on the Plaintiff's Motion for Entry of Judgment, Decree of Foreclosure and Order of Sale. After consideration, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court Decrees that Plaintiffs have a Mechanics and Materialmen's Lien pursuant to Idaho Code §45-501 et. Seq. against the real property

1- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

located at 3635 Redtail Street, Island Park, Idaho (Subject Property),

more particularly described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1,
Division 3, Fremont County, Idaho.

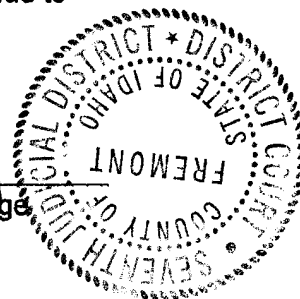
2. Judgment is hereby entered in favor of Plaintiffs in the sum of \$36,624.67 lawful money of the United States, with interest thereon at the lawful rate of interest from date hereof until paid for which Execution may issue against the property described in the preceding paragraph. This judgment is based upon the following calculations:

Principal Balance	\$	23,250.00
Accrued Interest	\$	7,826.67
Attorney Fees	\$	5,460.00
Court Costs	\$	88.00
Total Judgment	\$	36,624.67
Less Sum Previously Paid	\$	0.00
Final Judgment	\$	36,624.67

3. Plaintiffs are entitled to foreclose their lien by Sheriff's sale. The Sheriff of Fremont County, Idaho is ordered to sell the property described in paragraph 1 and apply the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the Plaintiffs.

DATED: ^{January} ~~December~~ 11, 2010

Dauren B. Simpson
Dauren B. Simpson, District Judge



2- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

NOTICE OF ENTRY

I CERTIFY that I am a clerk in the above-entitled Court, and that I mailed a true copy of the foregoing document(s) on ~~December~~ ^{January} 11, 2010, to the following attorney(s) of record and/or parties:

Name and Address

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Dale P. Thomson
Thomson Law
PO Box 609
Rexburg, ID 83440

David A. Johnson
Wright Johnson & Wayment, PLLC
PO Box 52251
Idaho Falls, ID 83405-2251

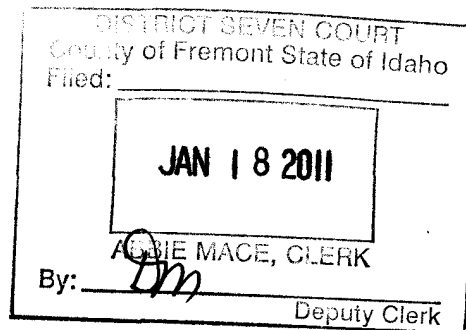
Clerk of the Court

By: 

Deputy Clerk

3- JUDGMENT, DECREE OF FORECLOSURE AND ORDER OF SALE

David A. Johnson, Esq.
Wright Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
Idaho State Bar No. 3319



Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

**AFFIDAVIT OF DAVID A. JOHNSON
(Third) CALCULATING INTEREST**

STATE OF IDAHO)
 :ss.
County of Bonneville)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.
3. The amount currently due Plaintiffs from Defendants Idaho Trademark Properties, LLC and Jenks Brother, Inc., is itemized as follows:


1- AFFIDAVIT OF DAVID A. JOHNSON (Third) CALCULATING INTEREST

Principal Balance	\$	23,250.00
Accrued Interest	\$	8,225.40
Attorney's Fees	\$	2,500.00
Court Costs/Sheriff's Fees	\$	1,059.00
Total Judgment	\$	35,034.40
Less Amount Collected	\$	1,500.00
FINAL JUDGMENT	\$	33,534.40

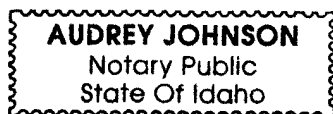
4. Prejudgment interest above is based upon the previous calculations submitted to the Court as of September 27, 2010. Prejudgment and post-judgment interest was calculated as follows:


Date	Principal Balance	Interest Rate	Number of Years	Accumulated Interest
January 1, 2008 to September 27, 2010	\$23,250.00	12.00% per annum	2.739	\$7,643.83
September 27, 2010 to January 20, 2011	\$34,342.00	5.375% per annum	.315	\$581.57
Total Interest				\$8,225.40

5. Credit has been given to Defendants Idaho Trademark Property LLC and Jenks Brothers, Inc., in the sum of \$1,500.00 as indicated in the Court's Order Regarding Attorney Fees filed on December 14, 2010.
6. DATED: January 14, 2011


David A. Johnson

SUBSCRIBED AND SWORN to before me on January 14, 2011.

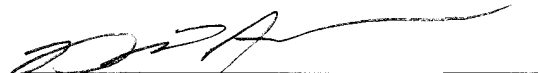



Notary Public for Idaho
Commission expires: 3/10/15

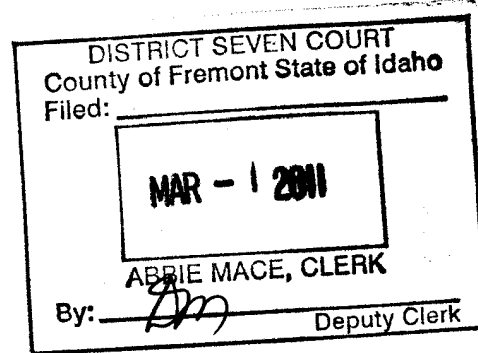
CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January 14, 2011, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

<u>Name and Address</u>	<u>Method of Service</u>
Kent W. Gauchay Simpson & Gauchay PO Box 50484 Idaho Falls, ID 83405-0484	Mail
Dale P. Thomson Thomson Law PO Box 609 Rexburg, ID 83440	Mail
Jenks Brothers, Inc. Brandon Jenks/Tony Jenks 3680 Mountain View Drive Rexburg, Idaho	Mail
Honorable Darren B. Simpson Bingham County Chambers 501 N. Maple, #310 Blackfoot, ID 83221-1700	Fax: 785-8057


David A. Johnson, Esq.

Lance E. Olsen / ISB No. 7106
 Derrick O'Neill / ISB No. 4021
 Brian R. Langford / ISB No. 7747
 ROUTH CRABTREE OLSEN
 300 Main Street, #150
 Boise, Idaho 83702
 Telephone: (208) 489-3035
 Facsimile: (208) 854-3998
lolsen@rcolegal.com
derrick@oneillpllc.com
brian@oneillpllc.com



Attorneys for Wells Fargo Bank, N.A.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

CHRIS AND JILL MAGLEBY, D.B.A.
 SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
 and wife, IDAHO TRADEMARK
 PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10

Defendants.

Case No.: CV OC 2008-0000469

**MOTION FOR PRELIMINARY
 INJUNCTION AND TEMPORARY
 RESTRAINING ORDER**

COMES NOW, Wells Fargo Bank, N.A. (hereafter "Wells Fargo"), by and through its attorneys, ROUTH CRABTREE OLSEN, and respectfully move this Court, under Rule 65, Idaho Rules of Civil Procedure, for a preliminary injunction and temporary restraining order enjoining Plaintiffs, Chris and Jill Magleby, d.b.a. Selective Builders, from proceeding with the judicial foreclosure of the real property commonly known as 3635 Redtail Street, Island Park, Idaho, and legally described as:

Lot 23, Block 1, Silverhawk Subdivision, Phase 1, Division 3, Fremont County, Idaho, as shown on the plat recorded July 25, 2005, as Instrument No. 496500

(hereafter "Property"). Said sheriff's sale is presently scheduled for March 3, 2011 at 10:00 a.m. in the foyer of the Fremont County Courthouse located at 151 W. 1st N., St. Anthony, Idaho.

Wells Fargo Claims an interest in the Property under a Deed of Trust dated November 29, 2007 and recorded as Instrument No. 514215 in the real property records of Fremont County, Idaho. Said Deed of Trust secures an obligation owing to Wells Fargo in the original principal amount of \$1,000,000.

This motion is made on the following grounds and for the following reasons:

1. That if the judicial foreclosure proceedings and the sheriff's sale are not prevented, it will result in great and irreparable injury to Wells Fargo. Counsel for Plaintiffs has taken the position that Plaintiffs' lien has priority over Wells Fargo's interest in the Property and that a foreclosure sale would eliminate Wells Fargo's interest.

WHEREFORE, Wells Fargo Bank, N.A., respectfully asks this Court for a preliminary injunction and temporary restraining order of the effect described above.

DATED: February 28, 2011.

ROUTH CRABTREE OLSEN

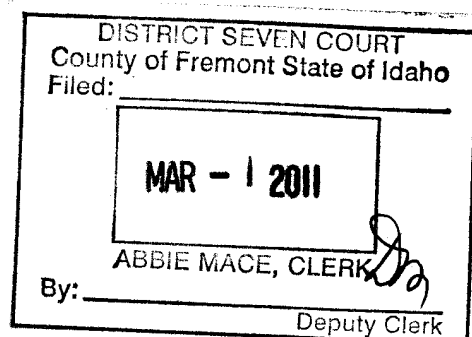
By:



Brian R. Langford, Of Counsel
Attorneys for Wells Fargo Bank, N.A.

Lance E. Olsen / ISB No. 7106
Derrick O'Neill / ISB No. 4021
Brian R. Langford / ISB No. 7747
ROUTH CRABTREE OLSEN
300 Main Street, #150
Boise, Idaho 83702
Telephone: (208) 489-3035
Facsimile: (208) 854-3998
lolsen@rcolegal.com
derrick@oneillpllc.com
brian@oneillpllc.com

Attorneys for Wells Fargo Bank, N.A.



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

CHRIS AND JILL MAGLEBY, D.B.A.
SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
and wife, IDAHO TRADEMARK
PROPERTIES, LLC, JENKS
BROTHERS, INC., and DOES 1-10

Defendants.

Case No.: CV OC 2008-0000469

NOTICE OF TELEPHONIC HEARING

PLEASE TAKE NOTICE That a hearing will be held on the 2nd day of March, 2011
at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel may be heard, via telephone
conference call on Wells Fargo Bank's Motion for Preliminary Injunction and Temporary
Restraining Order before the Honorable Darren Simpson. Counsel for Wells Fargo will initiate
the conference call.

//

//

DATED: February 28, 2011.

ROUTH CRABTREE OLSEN

By:



Brian R. Langford, Of Counsel
Attorneys for Wells Fargo Home Mortgage

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 28th day of February, 2011, I caused a true and correct copy of the foregoing document to be served as follows:

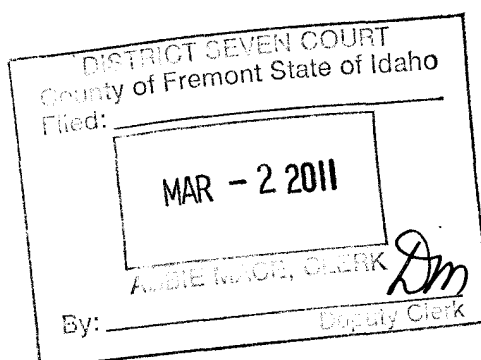
David Johnson
WRIGHT JOHNSON & WAYMENT PLLC
P.O. Box 52251
Idaho Falls, Idaho 83405-2551

____ U.S. Mail
☒ Facsimile (208) 523-4400
____ Overnight Mail

Kent Gauchay
SIMPSON & GAUCHAY
P.O. Box 50484
Idaho Falls, Idaho

____ U.S. Mail
☒ Facsimile (208) 522-4295
____ Overnight Mail


Brian R. Langford



David A. Johnson, Esq.
 Wright Johnson & Wayment, PLLC
 477 Shoup Avenue, Suite 109
 P.O. Box 52251
 Idaho Falls, ID 83405-2251
 Telephone (208) 535-1000
 Facsimile (208) 523-4400
 Idaho State Bar No. 3319

Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

**CHRIS AND JILL MAGLEBY, D.B.A
 SELECTIVE BUILDERS**

Plaintiffs,

vs.

**KEVIN AND TANYA GARN, husband
 and wife, IDAHO TRADEMARK
 PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10**

Defendants.

Case No: CV-08-469

AFFIDAVIT OF DAVID A. JOHNSON

STATE OF IDAHO)
 : ss.
 County of Fremont)

David A. Johnson, first being duly sworn, deposes and states:

1. I am the attorney for the Plaintiffs in this matter.
2. I make this affidavit based upon my own knowledge, information and belief.
3. I am the custodian of the Magleby's record and was responsible for the filing of

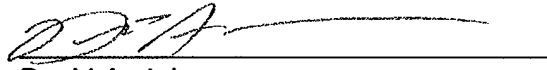
1- AFFIDAVIT OF DAVID A. JOHNSON

*Filed to Ct
 OA's chambers
 3-2-11
 aj*

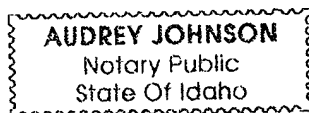
the Complaint herein.


4. On September 9, 2010, the Complaint was sent to Fremont County Courthouse for filing by Guaranteed Express Mail via the United State Postal Service.
5. Attached hereto as Exhibit A is a true and correct copy of the Cover Letter, Receipt and USPS Express Mail Service Commitments that is part of our file showing timely delivery to the Fremont County Clerk.
6. Attached hereto as Exhibit B is a true and correct copy of the email received from Derrick O'Neill dated February 25, 2011 and my response to the same.
7. Attached hereto as Exhibit C is a true and correct copy of the email received from Derrick O'Neill dated February 27, 2011 and my response to the same.

DATED: March 2, 2011


David A. Johnson

SUBSCRIBED AND SWORN to before me on March 2, 2011.




Notary Public for Idaho
Commission expires: 3/10/15

2- AFFIDAVIT OF DAVID A. JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 2, 2011, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and AddressMethod of Service

Kent W. Gauchay
Simpson & Gauchay
PO Box 50484
Idaho Falls, ID 83405-0484

Fax: 522-4295

Dale P. Thomson
Thomson Law
PO Box 609
Rexburg, ID 83440

Fax: 356-9336

Derrick O'Neill
Routh Crabtree Olsen, P.S.
300 Main Street, Suite 150
Boise, ID 83702

Fax: 208-854-3998

Honorable Darren B. Simpson
Bingham County Chambers
501 N. Maple, #310
Blackfoot, ID 83221-1700

Fax: 785-8057



David A. Johnson, Esq.



EB 945079433 US

ORIGIN (POSTAL SERVICE USE ONLY)			
PO ZIP Code 83402		Day of Delivery <input type="checkbox"/> Next <input type="checkbox"/> 2nd <input type="checkbox"/> 3rd Del Day	Postage \$ 16.50
Date Accepted 9-9-05		Scheduled Date of Delivery Month 9 Day 10	Return Receipt Fee \$
Mo. Day Year 9-9-05	Scheduled Time of Delivery <input type="checkbox"/> Noon <input checked="" type="checkbox"/> 3 PM	COD Fee \$	Insurance Fee \$
Time Accepted <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM	Military <input type="checkbox"/> 2nd Day <input type="checkbox"/> 3rd Day	Total Postage & Fees \$ 16.50	
Flat Rate <input type="checkbox"/> or Weight	Int'l Alpha Country Code	Acceptance Emp. Initials DHS	
Ind. 11 OZS.			

FROM: (PLEASE PRINT) PHONE (208) 535-1000

DAVID A JOHNSON
WRIGHT JOHNSONS TOLSON & WAYMENT
PO Box 52251
IDAHO FALLS ID 83405-2251

Magleby - Carn

FOR PICKUP OR TRACKING

WWW.USPS.COM



UNITED STATES POSTAL SERVICE®

Customer Copy
Label 11-B, March 2004

Post Office To Addressee

DELIVERY (POSTAL USE ONLY)		
Delivery Attempt	Time <input type="checkbox"/> AM <input type="checkbox"/> PM	Employee Signature
Mo. Day		
Delivery Attempt	Time <input type="checkbox"/> AM <input type="checkbox"/> PM	Employee Signature
Mo. Day		
Delivery Date	Time <input type="checkbox"/> AM <input type="checkbox"/> PM	Employee Signature
Mo. Day		

CUSTOMER USE ONLY

PAYMENT BY ACCOUNT
Express Mail Corporate Acct. No.

☐ WAIVER OF SIGNATURE (Domestic Mail Only)
Additional merchandise insurance is void if customer requests waiver of signature.
I wish delivery to be made without obtaining signature of addressee or addressee's agent (if delivery employee judges that article can be left in secure location) and I authorize that delivery employee's signature constitutes valid proof of delivery.

Federal Agency Acct. No. or
Postal Service Acct. No.

☐ NO DELIVERY
☐ Weekend ☐ Holiday ☐ Mailer Signature

TO: (PLEASE PRINT) PHONE (208) 624-7601

FREMONT COUNTY CLERK
FREMONT COUNTY COURTHOUSE
151 WEST 1ST NORTH
ST ANTHONY ID 83445

ZIP + 4 (U.S. ADDRESSES ONLY. DO NOT USE FOR FOREIGN POSTAL CODES.)

8	3	4	4	5	+				
---	---	---	---	---	---	--	--	--	--

FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.

EXHIBIT A

USPS - Express Mail Service Commitments - Search Results

Page 1 of 1



Home

[Express Mail Service Commitments](#)
[FAQs](#)

Express Mail Service Commitments

Search Results

Search Criteria

Origin ZIP Code™: 83405 (IDAHO FALLS, ID)

Shipping Date: September 09, 2008

Destination ZIP Code: 83445 (SAINT ANTHONY, ID)

Express Mail® Hold for Pickup is available for this destination.

Service Commitment Information

All results are based on drop-off time. ?

 Express Mail®
 Express Mail® Hold for Pickup

Service Commitment	Drop-off By	Facility Type	Address
Next Day by 3:00 PM Express Mail®	5:30 PM	POST OFFICE	875 N CAPITAL AVE IDAHO FALLS, ID 83402
Next Day by 10:00 AM Express Mail® Hold for Pickup	5:30 PM	POST OFFICE	875 N CAPITAL AVE IDAHO FALLS, ID 83402
Page 1		Total (2 results)	

[< New Search](#)
[Expand Search Radius >](#)

What You Should Know

- Express Mail® service commitments are based on drop-off times.
- Express Mail may be paid by stamps, Postage Meter, PC Postage®, or Express Mail Corporate Account.
- Print Express Mail labels online with Click-N-Ship®.
- Learn more about Express Mail.
- Calculate postage with Domestic Rate Calculator.

[Site Map](#)
[Contact Us](#)
[Forms](#)
[Gov't Services](#)
[Jobs](#)
[Privacy Policy](#)
[National & Premier Accounts](#)

Copyright © 1999-2007 USPS. All Rights Reserved. Terms of Use No FEAR Act EEO Data

Postal Inspectors
Preserving the TrustInspector General
Promoting Integrity

David A. Johnson, P. A.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, Idaho 83405-2251
(208) 535-1000
(208) 523-4400 Fax
dj@ida.net

September 9, 2008

EXPRESS MAIL

Fremont County Clerk
Fremont County Courthouse
151 West 1st North
St. Anthony ID 83445

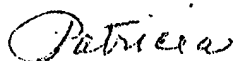
Re: Magelby v. Garn, et al

Dear Sir or Madam:

Enclosed for filing on September 10, 2008, is a Complaint (5) and three Summons (each in triplicate), together with an \$88.00 check for the filing fee.

Please return the conformed copies of the Complaint and the Summons to our office in the addressed and stamped envelope.

Sincerely,



Patricia Butikofer
Paralegal

Enclosures as stated

cc: Chris and Jill Magelby

EB9450794330S

David Johnson

From: David Johnson [dj@ida.net]
Sent: Friday, February 25, 2011 5:29 PM
To: 'Derrick Oneill'; 'Brian Langford'
Cc: 'Selective'
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429
Attachments: Complaint.pdf

Mr. Oneill and Mr. Langford,

I acknowledge receipt of your email and related documents. We were not aware of your clients DOT until recently. Because Wells Fargo was not listed in our lawsuit, the same would not extinguish your client's lien. However, my clients do have a superior lien position to Wells Fargo pursuant to Idaho Code Sec. 45-506. Attached is a copy of our complaint. The majority of the work done by my client pursuant to the claim of lien was prior to the DOT by Wells Fargo. The clear language of 45-506 gives my client priority over your client's DOT.

If my client's are the successful bidder at the Sheriff's sale, we will subsequently bring a supplemental proceeding in the present case, or commence a separate quiet title action to extinguish your client's DOT. However, our primary desire is to get my clients paid. If you wish to know what the pay off would be or otherwise communicate further, please feel free to contact me.

Dave Johnson

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
email: dj@ida.net

From: Derrick Oneill [mailto:derrick@oneillpllc.com]
Sent: Friday, February 25, 2011 4:27 PM
To: David Johnson
Cc: Brian Langford
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429

Mr. Johnson: I've been contacted by Wells Fargo to respond to your proposed foreclosure sale of the property located at 3635 Redtail Street in Island Park.

While I don't have much material at this point, I did notice that your judgment and case heading do not mention the Deed of Trust in favor of my client. A copy of the DOT is attached. As you can see, it is security for a promissory note in the amount of \$1,000,000.00 and was recorded November 30th, 2007.

I appreciate the fact that you believe your client's lien interest is superior to the interests of Wells Fargo, however, unless you served Wells Fargo with the complaint and specifically obtained judgment against their interest, I don't believe your action will extinguish our DOT.

As I mentioned, having not seen your complaint, I can only surmise what the relative priorities of our

3/2/2011

EXHIBIT B

clients might be. However, I'm not sure how you believe you can attack my client's priority without making my client a party to your action.

Please advise as to your position on this. I would prefer to avoid attacking your judgment unnecessarily, but with the sale date coming so quickly, I fear I may not have much choice.

I look forward to your prompt reply.

Derrick

Derrick O'Neill
Routh Crabtree Olsen, P.S.
300 Main Street, Suite 150
Boise, Idaho 83702
208-489-3035
fax 208-854-3998
derrick@oneillpllc.com

David Johnson

From: David Johnson [dj@ida.net]
Sent: Monday, February 28, 2011 8:52 AM
To: 'Derrick Oneill'
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429

Derrick,

I certainly don't mind having a continuing dialog on this case, but we are obviously have opposite views of the law. To perfect a mechanic's lien, Idaho Code 45-507 only requires service upon the "owner or reputed owner" Your assertion of additional service upon an unknown entity r client imposes a requirement not found in the law.

The easy solution is for Garns to pay the judgment, which I believe they could easily do if they choose to do so. Although plenty affluent, they presently throughout this case have ignored this lawsuit and have failed to be in communication with their own attorney.

We cannot agree to a vacating of the sale. While the same may benefit your client, the same has no benefit to my client and I see no reason for the delay. I don't see any merit to your client obtaining an injunction. Your clients were notified over a month ago of what we were going to do, which notice was prior to having the sale scheduled, publication, etc. Because your client choose not to act promptly does not give them the ability to stop the sale at the last minute. Your client has adequate remedies without stopping the sale. I always hesitate in telling the other side what to do, but would remind you that your client should contact the title company issuing any policy on your loan.

Dave.

David A. Johnson , Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
email: dj@ida.net

From: Derrick Oneill [mailto:derrick@oneillpllc.com]
Sent: Sunday, February 27, 2011 2:51 PM
To: David Johnson; Brian Langford
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429

Dave: We certainly don't want to escalate things unnecessarily, but I think you are misstating the law. You failed to perfect your lien as against my client within 6 months are required by law. Moreover, you've already obtained your judgment and decree.

Of course, having not seen your lien or supporting data, we can only accept your representation that your client started work before our client's Deed of Trust attached. With that assumption, you may have had priority over our Deed of Trust had you properly perfected your lien. However, at this point, you don't have any basis in law for trying to allege priority over our client.

Given your stated intentions, I think we have little choice but to try and enjoin your sale. Of course, we'd prefer it if you would voluntarily vacate the current sale date. In the alternative, if you would

3/2/2011

EXHIBIT C

stipulate to an order that your sale does not affect the priority of our client, I think that would satisfy our client's concerns.

Derrick

From: David Johnson [mailto:dj@ida.net]
Sent: Friday, February 25, 2011 5:29 PM
To: Derrick Oneill; Brian Langford
Cc: 'Selective'
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429

Mr. Oneill and Mr. Langford,

I acknowledge receipt of your email and related documents. We were not aware of your clients DOT until recently. Because Wells Fargo was not listed in our lawsuit, the same would not extinguish your client's lien. However, my clients do have a superior lien position to Wells Fargo pursuant to Idaho Code Sec. 45-506. Attached is a copy of our complaint. The majority of the work done by my client pursuant to the claim of lien was prior to the DOT by Wells Fargo. The clear language of 45-506 gives my client priority over your client's DOT.

If my client's are the successful bidder at the Sheriff's sale, we will subsequently bring a supplemental proceeding in the present case, or commence a separate quiet title action to extinguish your client's DOT. However, our primary desire is to get my clients paid. If you wish to know what the pay off would be or otherwise communicate further, please feel free to contact me.

Dave Johnson

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, PLLC
477 Shoup Avenue, Suite 109
P.O. Box 52251
Idaho Falls, ID 83405-2251
Telephone (208) 535-1000
Facsimile (208) 523-4400
email: dj@ida.net

From: Derrick Oneill [mailto:derrick@oneillpllc.com]
Sent: Friday, February 25, 2011 4:27 PM
To: David Johnson
Cc: Brian Langford
Subject: RE: Garn 3635 REDTAIL STREET ; ISLAND PARK ID 83429

Mr. Johnson: I've been contacted by Wells Fargo to respond to your proposed foreclosure sale of the property located at 3635 Redtail Street in Island Park.

While I don't have much material at this point, I did notice that your judgment and case heading do not mention the Deed of Trust in favor of my client. A copy of the DOT is attached. As you can see, it is security for a promissory note in the amount of \$1,000,000.00 and was recorded November 30th, 2007. I appreciate the fact that you believe your client's lien interest is superior to the interests of Wells Fargo, however, unless you served Wells Fargo with the complaint and specifically obtained judgment against their interest, I don't believe your

3/2/2011

action will extinguish our DOT.

As I mentioned, having not seen your complaint, I can only surmise what the relative priorities of our clients might be. However, I'm not sure how you believe you can attack my client's priority without making my client a party to your action.

Please advise as to your position on this. I would prefer to avoid attacking your judgment unnecessarily, but with the sale date coming so quickly, I fear I may not have much choice.

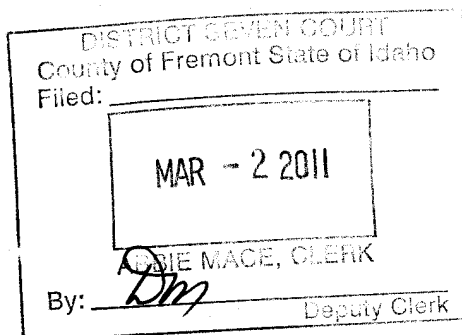
I look forward to your prompt reply.

Derrick

Derrick O'Neill
Routh Crabtree Olsen, P.S.
300 Main Street, Suite 150
Boise, Idaho 83702
208-489-3035
fax 208-854-3998
derrick@oneillpllc.com

Lance E. Olsen / ISB No. 7106
 Derrick O'Neill / ISB No. 4021
 Brian R. Langford / ISB No. 7747
 ROUTH CRABTREE OLSEN
 300 Main Street, #150
 Boise, Idaho 83702
 Telephone: (208) 489-3035
 Facsimile: (208) 854-3998
lolsen@rcolegal.com
derrick@oneillpllc.com
brian@oneillpllc.com

Attorneys for Wells Fargo Bank, N.A.



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

CHRIS AND JILL MAGLEBY, D.B.A.
 SELECTIVE BUILDERS

Plaintiffs,

vs.

KEVIN AND TANYA GARN, husband
 and wife, IDAHO TRADEMARK
 PROPERTIES, LLC, JENKS
 BROTHERS, INC., and DOES 1-10

Defendants.

Case No.: CV OC 2008-0000469

**BRIEF IN SUPPORT OF MOTION FOR
 PRELIMINARY INJUNCTION AND
 TEMPORARY RESTRAINING ORDER**

I. Introduction

On January 11, 2011, Plaintiffs Chris and Jill Magleby, d.b.a. Selective Builders, obtained a judgment and decree of foreclosure with respect to the real property commonly known as 3635 Redtail Street, Island Park, Idaho (hereafter "Property"). In that judgment, the Court decreed that Plaintiffs have a mechanics and materialmen's lien pursuant to Idaho Code § 45-501 *et seq.* against the Property, and that Plaintiffs are entitled to foreclose their lien by Sheriff's sale. A

sheriff's sale has been scheduled for March 3, 2011, at 10:00 a.m. in the foyer of the Fremont County Courthouse.

Wells Fargo Bank, N.A. (hereafter "Wells Fargo"), claims an interest in the Property under a Deed of Trust dated November 29, 2007 and recorded as Instrument No. 514215 in the real property records of Fremont County, Idaho. Said Deed of Trust secures an obligation owing to Wells Fargo in the original principal amount of \$1,000,000.00. Wells Fargo seeks a preliminary injunction and temporary restraining order enjoining Plaintiffs from proceeding with the sheriff's sale.

II. Facts

It is believed that in the summer of 2007, Plaintiffs were approached by one or more of the Defendants, or their representatives, and asked to perform certain construction services on the Property in exchange for payment of a percentage of the purchase price when the home eventually sold. Plaintiffs agreed to perform such services, and commenced work under that agreement. On or about November 29, 2007, Defendants Kevin and Tanya Garn borrowed \$1,000,000 from Wells Fargo in order to purchase the Property. To secure the loan, the Garns executed a Deed of Trust on the property in favor of Wells Fargo. The Deed of Trust was recorded as Instrument No. 514215 in the real property records of Fremont County on November 30, 2007. A true and correct copy of the Deed of Trust is attached to the affidavit of Brian R. Langford which is filed concurrently with this brief.

It appears that Plaintiffs were not compensated for their services, and on or about March 10, 2008, Plaintiffs filed a claim of lien on the Property. The claim of lien was filed with the Fremont County recorder as Instrument No. 515729. On September 12, 2008, Plaintiffs initiated this lawsuit against the above named Defendants seeking a judgment and decree of foreclosure